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# In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 621

FREDERICK WISEMAN, *et al.*,
PETITIONERS,

v.

COMMONWEALTH OF MASSACHUSETTS, *et al.*,
RESPONDENTS.

## PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

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## PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

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The petitioners, Frederick Wiseman and Bridgewater Film Company, Inc., respectfully pray that a writ of certiorari issue to review the judgment of the Supreme Judicial Court of the Commonwealth of Massachusetts entered on June 24, 1969, in the case of *Commonwealth of Massachusetts et al.* v. *Frederick Wiseman, et al.*, docket number 7205.

## Reports of Opinions Below

The Opinion of the Supreme Judicial Court of the Commonwealth of Massachusetts, set forth as Appendix A to this petition, has been reported in 1969 Mass. Adv. Sh. 1055. It has not yet been reported in the Massachusetts Reports or Northeast Reporter.

The Opinion of the Superior Court of the Commonwealth, set forth as Appendix B to this petition, has not been reported in any official or unofficial reports.

The Opinion of the United States District Court for the Southern District of New York in a related case, *Cullen* v. *Grove Press, Inc.*, is reported as 276 F. Supp. 727 (S.D.N.Y. 1967), and is set forth as Appendix E to this petition.

## Jurisdictional Grounds

The judgment of the Supreme Judicial Court of the Commonwealth of Massachusetts, sought to be reviewed, is set forth as Appendix C to this petition. It was entered on June 24, 1969. A Final Decree After Rescript, entered by the Superior Court on July 9, 1969, is set forth as Appendix D to this petition.[1]

Jurisdiction to review the judgment in question is conferred upon this Court by the provisions of 28 U.S.C. 1257(3), the petitioners relying upon rights, privileges and immunities claimed under the First and Fourteenth Amendments to the Constitution of the United States of America.

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[1] Under Massachusetts practice, in equity cases appealed to the Supreme Judicial Court, that court enters a "Rescript" containing its mandate and the Superior Court thereafter enters a Final Decree After Rescript, which is supposed to conform to the terms of the Rescript.

## Questions Presented for Review

1. Does the First Amendment permit a state to prohibit the showing to the general public of a documentary motion picture film which relates to a subject matter of acknowledged public interest and importance, and which is neither false nor obscene?

2. Does the First Amendment permit a state to prohibit the showing to the general public of a documentary motion picture film depicting actual events and conditions at a state prison, on the theory that the state is protecting the "privacy" of prison inmates shown in the film?

3. If a state allows a documentary motion picture film to be filmed in a state prison upon the conditions that written releases shall be obtained from all inmates shown in the film and that approval of state officials must be granted before any public exhibition of the film, does the First Amendment permit the state to enforce those conditions by an injunction against exhibition of the film to the public?

## Constitutional Provisions Involved

First Amendment to the Constitution of the United States: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

Fourteenth Amendment to the Constitution of the United States, Section 1: ". . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

## Statement of the Case

### Introductory Statement

This case presents a number of important First Amendment questions which never have been decided by the Supreme Court of the United States.[2] The case involves a documentary motion picture film showing actual events and conditions (Tr. 3-66, 6-4)[3] filmed at a state prison[4] in Massachusetts. The highest court of Massachusetts has rendered a final decision prohibiting "showing the film to the general public" (A-42), and restricting exhibition exclusively to a limited group of professional persons and students.[5] (Indeed, even this limited group may not see the film unless it is accompanied by "a brief explanation that changes and improvements have taken place in the institution since 1966." (A-43) The court below has ruled that the ordinary citizen may not view this film, despite its recognition that "the film gives a striking picture of life at Bridgewater and of the problems affecting treatment at that or any similar institution" (A-42) and that "the film may indirectly have been of benefit to some inmates by leading to improvement of Bridgewater." (A-44)

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[2] Among the "considerations governing review on certiorari" as stated in Supreme Court Rule 19 is the following: "Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court."

[3] In this petition pages of the appendices to the petition are designated "A-", pages of the printed record below are indicated by "R.", and pages of the transcript of proceedings at trial are indicated by "Tr."

[4] The "Massachusetts Correctional Institution, Bridgewater", a name "of no constitutional consequence — and of limited practical meaning." *Cf. In re Gault*, 387 U.S. 1, 27 (1967). Much of the filming was done in the so-called "State Hospital" section of the prison, where inmates with mental problems are confined.

[5] The film may be viewed only by "legislators, judges, lawyers, sociologists, social workers, doctors, psychiatrists, students in these or related fields, and organizations dealing with the social problems of custodial care and mental infirmity." (A-42)

If the decision below is permitted to stand, it will represent the first instance in the history of this nation in which the Supreme Court has permitted a state to censor and suppress a film of conceded social value—the first decision under which adult citizens have been denied access to a film which is available to limited professional groups—the first case in which speech on a public issue has been banned for alleged violation of privacy or of a contract—and the first time that the dissemination of speech has been conditioned upon the speaker's making a simultaneous declaration reflecting views of the government.[6]

The decision below, although made by the highest court of only one state, affects the freedoms of citizens in all of the states. Surely it should not be permitted to become the law of the land—thereby changing the law as it has stood for almost 200 years—without full consideration by the highest court of the nation.

The film is entitled "Titicut Follies". It takes its name from the name of an annual variety show produced by inmates and staff of the prison. (Tr. 3-137, 4-37, 4-139, 7-170, 13-55)[7] The film was produced from materials actually filmed and recorded at the prison; nothing was staged or acted. (Tr. 3-66, 6-4) There is no contention that the film is obscene in any sense. The Massachusetts ban on public showings, which extends throughout the world, was based upon an alleged violation of "privacy" of the inmates of the prison, and violation of conditions allegedly imposed by the officials of the state in granting permission for filming at the prison. These violations were asserted by the state, allegedly on behalf of the inmates, although no inmate had objected to public showing of the film.

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[6] Here, that "changes and improvements have taken place in the institution since 1966" (A-43), a view to which the petitioners do not subscribe.

[7] The "Titicut Follies" variety show in turn derives its name from the old Indian name "Titicut" for the site of the prison. (Tr. 3-140)

**Proceedings in Lower Courts**

The petitioners below (plaintiffs) were the Commonwealth of Massachusetts; John A. Gavin, in his capacity as Commissioner of the Department of Correction of the Commonwealth; Charles W. Gaughan in his capacity as Superintendent of the Bridgewater prison; and Gaughan in his alleged capacity as guardian of James Bulcock, an inmate of the prison who is shown in the film in scenes where he is taunted by guards and slapped by one of them.[8]

The original defendants (called "respondents" in the pleadings below) in the case were Frederick Wiseman, who produced and directed the film,[9] and Bridgewater Film Company, Inc., a Massachusetts corporation formed to handle distribution of the film.[10]

Suit was commenced in the Superior Court of the Commonwealth of Massachusetts for Suffolk County, sitting in Boston, Massachusetts, on September 22, 1967.

Trial of the case in the Superior Court, without a jury, commenced on November 20, 1967, and lasted until Decem-

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[8] There is a question about the good faith of Gaughan's guardianship, his appointment having been made just prior to commencement of suit, and his interests in suppression of the film probably being antagonistic to those of Bulcock.

[9] Wiseman is a documentary film maker of unusual ability and talent. Subsequent to trial of this case his documentary film "Law and Order", showing operations of the Kansas City police department and screened on National Educational Television, received an "Emmy" award as the best television news documentary of the year. "High School", a documentary filmed in a large metropolitan high school, has received widespread acclaim.

[10] Subsequently Grove Press, Inc., and Titicut Follies Film Distributing Company, Inc., two New York corporations which were involved in distribution of the film, were added as defendants; but these corporations contested the jurisdiction of the Massachusetts courts, did not participate in the trial, and were not parties to the subsequent appeal.

ber 13, 1967. On January 4, 1968, the Superior Court trial judge published his Findings, Rulings and Order for Decree. (R. 43) On August 6, 1968, he entered a Final Decree (R. 60), which enjoined the defendants from exhibiting the film to any person or audience and ordered the defendants to turn over to the Attorney General of the Commonwealth all materials filmed and recorded at the prison and not incorporated into the finished film, such materials to be destroyed by the Attorney General.

The defendants immediately claimed an appeal to the Supreme Judicial Court of Massachusetts, the highest court of the state. (R. 62) The case was argued in that court on May 6, 1969, and the opinion of that court (A-31) was published on June 24, 1969. The Supreme Judicial Court ruled that the film could be shown to lawyers, doctors, social workers, and other limited professional-type audiences, but not to the general public. The order for destruction of the filmed materials was set aside.

On July 9, 1969, the trial judge entered a Final Decree After Rescript (A-63), which imposed onerous conditions upon even the limited showings authorized by the appellate court. The defendants have claimed a second appeal, from the Final Decree After Rescript, but on that appeal the only issue will be whether or not the decree conforms to the rescript of the appellate court. *Wayland* v. *Lee*, 331 Mass. 550, 551 (1954). The absolute prohibition against showing the film to the public cannot be further reviewed in the Massachusetts courts. Therefore the decision of the highest court of Massachusetts is final with respect to the constitutional issues, and the case is ripe for review by this Court. See *Cole* v. *Violette*, 319 U.S. 581, 582 (1943).

**Constitutional Issues Raised**

Throughout the trial and appeal the defendants relied upon the provisions of the First Amendment relating to freedom of speech and freedom of the press as precluding any injunction against exhibition of the film. These issues were specifically raised by their answer filed at the start of the trial (paragraphs 19, 20, 45, 46 and 48; R. 34-35, 40-41).

The trial court rejected these contentions, with disparaging reference to "*shibboleths* of 'free speech' and the 'right of the public to know'" (R. 48) and ruled that the conditions imposed upon the filming would not constitute a violation of "the right of free speech and of the free dissemination of news" (R. 55), criticizing the defendants for "attempting to cast the Commonwealth of Massachusetts in the role of a malefactor seeking to suppress matters of legitimate concern; and to picture the State as trying to hide from public view and knowledge alleged unsatisfactory conditions at one of its institutions." (R. 56)

The Supreme Judicial Court in its opinion acknowledged that the conditions existing in the prison were a matter of legitimate public concern (A-39) but decided that (A-40):

> "In the circumstances there will be no unreasonable interference with any publication of matters of public concern if showing the film to the general public is prevented (a) to protect interests of the inmates in privacy, and (b) because Mr. Wiseman went unreasonably beyond the scope of the conditional permission to enter, and take pictures upon, State owned premises properly not generally open for public inspection and photography."

The Supreme Judicial Court expressly declined to apply the principles set forth by this Court in *Time, Inc.* v. *Hill*, 385 U.S. 374 (1967), as construed by a federal court in the related case of *Cullen* v. *Grove Press, Inc.*, 276 F. Supp.

727 (S.D.N.Y.) 1967). (A-66) (See Section III of this petition for detailed discussion.)

## Statement of Facts

The completed film "Titicut Follies" consists of scenes and events filmed and recorded at the Massachusetts Correctional Institution, Bridgewater, during the period from April 22, 1966 (Tr. 13-62) to June 29, 1966 (Tr. 13-135). Except for titles and film credits, the film consists of only actual scenes and events recorded at the prison. (Tr. 3-66, 6-4) Editing of the completed film, which consists of 3,200 feet of film with soundtrack, selected from a much larger volume of filmed materials (Tr. 13-80, 7-96, 13-75), was completed about June 1, 1967. (Tr. 13-167, 13-171) No narration or verbal explanation of the scenes is provided, each viewer being left to his own conclusions and reactions.

The first public showing was at the New York Film Festival at Lincoln Center in New York City on September 28, 1967. (Tr. 7-115) Later the film was shown in two theatres in New York City for brief periods. (Tr. 7-116, 7-121)

The film was viewed by the trial judge (Tr. 2-37) and is included in the record. (Exhibit 9) Upon appeal, it was seen by members of the Supreme Judicial Court. (A-32) The defendants respectfully suggest that this Court should view the film before ruling upon this petition.

The film is disturbing and depressing. It reflects gross inadequacies in the treatment afforded to mentally disturbed inmates of the Bridgewater institution. Reactions to the film have varied considerably. For example, although the Attorney General of the Commonwealth found the film to be "impressive" and "powerful" (Tr. 11-50, 12-29, 12-113, 14-11) and said that it "overwhelmed" him (Tr. 11-150, 12-29), and although an eminent documentary film maker (Tr. 17-3) testified that the film "makes an honest impression on an audience" and has an "interesting struc-

ture" (Tr. 17-13), the trial judge saw only "a nightmare of ghoulish obscenities" and a "hodge-podge of sequences" (R. 47); but the Supreme Judicial Court commented that: "The seemingly random and somewhat incoherent sequence of scenes . . . is not likely to confuse seriously interested professional and student audiences. The film, even in its present form, may be highly informative to such specialized audiences." (A-42, Footnote 11)

Portions of the film would indeed be shocking to a sensitive viewer — scenes of an inmate being force fed with a tube while the cigarette ash of a doctor dangles ominously over the liquid food, interspersed with scenes of the corpse of the same man being prepared for burial with meticulous care — callous and sarcastic indifference of a doctor to a young inmate's pleas for better treatment — a black inmate taunted when he pleads for work — an inmate[11] struck by a guard and goaded into a senseless rage by guards.

It is extremely difficult to describe in words the message and impact of the film. (Indeed, therein lies the value of the film as a film, in contrast to any written or printed medium of expression.)

The several expert witnesses who testified at the trial were unanimous in stating that the film has substantial value for a variety of purposes.

Louis M. Lyons, retired director of the Nieman Fellowships in journalism at Harvard University (Tr. 16-99), an experienced newspaper reporter (Tr. 16-100) and now a news broadcaster for the local educational television station (Tr. 16-99), testified that the film has value for its news qualities and "was an important exposure of conditions in a public institution that should be exposed" (Tr. 16-101), and that ". . . there was a condition

[11] Bulcock, allegedly a plaintiff through his guardian Gaughan, the superintendent of the prison.

in Bridgewater that very much needed exposure, and this film was a serious and important attempt at it." (Tr. 16-102)

Gerhart D. Wiebe, Dean of the School of Public Communication at Boston University (Tr. 16-121) testified that "the film has great utility and is effective in communicating ideas to the public, and important ideas." (Tr. 16-124)

Richard Schickel, film critic for Life Magazine (Tr. 16-44) and an author of books on films (Tr. 16-45) found it to be a film of artistic merit and educative social value (Tr. 16-50, 16-53) and "a very important film." (Tr. 16-96)

Willard Van Dyke, director of the department of film at the Museum of Modern Art (Tr. 17-3), president of the Robert Flaherty International Film Seminars (Tr. 17-4), and an experienced maker of documentary films (Tr. 17-4, 17-5) stated his opinion that the film had value as an educational documentary film ("a film about things as they are" (Tr. 17-6), "a film in which the film maker lets the film speak for itself" (Tr. 17-23)) and commended the camera work, sound, structure, and honesty of the film. (Tr. 17-13)

Lloyd Edward Ohlin, a professor of sociology at the Harvard Law School and formerly associate director of the National Crime Commission (Tr. 16-5, 16-6); Joseph Goldstein, a professor of law at Yale University (Tr. 16-134); and Dr. Leon Shapiro, an associate professor of psychiatry at Tufts Medical School (Tr. 16-173) also testified that the film has substantial value.

The plaintiffs presented no expert testimony adverse to the film at trial.

The film had been selected for showing at the Lincoln Center film festival as an outstanding documentary (Tr. 14-25) and was awarded the first prize as the best

documentary film at the Mannheim film festival in 1967. (Tr. 14-24) National Educational Television wanted to show the film. (Tr. 7-164, 15-141)

The idea of making the film originated with Frederick Wiseman. His purposes were to inform the general public about the Bridgewater institution and to make a film suitable for training and educational purposes. (Tr. 15-132) In 1965 he had some preliminary discussions with Gaughan, the superintendent of the prison. (Tr. 4-12, 13-11) Gaughan generally favored the idea (Tr. 4-15), hoping that such a film would develop more public interest in the institution (Tr. 4-84, 4-85).

The prison at Bridgewater housed a variety of inmates, including many persons labelled as "criminally insane." (Tr. 4-11) It was inadequately staffed (Tr. 4-85, 5-93), having only two psychiatrists and one "junior physician" to care for 700 inmates. (Tr. 4-86, 5-82, 5-85) One of the psychiatrists had no training in that field, apart from what he learned in "on-the-job-training" there. (Tr. 10-189, 10-190, 10-192) The physical plant and equipment were old and inadequate (Tr. 4-85, 5-93, 5-94), and Gaughan had been unable to obtain adequate funds to operate the institution. (Tr. 5-92, 5-93)

After further discussions between Wiseman and Gaughan (Tr. 4-18, 13-19), they met with Gavin, the Commissioner of Correction (Tr. 3-5, 4-23, 13-26), who expressed doubts about "filming in the oldest and least impressive of our correctional institutions", with its "old and antiquated facilities" (Ex. 2) and subsequently refused permission for the filming. (Ex. 3)

However, in late 1965 Gavin reconsidered the matter, at the suggestion of the Lieutenant Governor of Massachusetts (Tr. 12-110), and after Gavin obtained an opinion from the Attorney General indicating that the filming would be within the discretion of Gaughan and that it would be

proper to film consenting inmates (Ex. 5), Gavin granted permission for the filming in early 1966. (Ex. 5A)

No written agreement relating to the terms upon which the film could be made was executed. At trial Gavin and Gaughan testified that Wiseman agreed orally to certain conditions imposed by them, and the trial judge chose to believe their testimony (R. 44) despite Wiseman's contradictory testimony and other evidence tending to cast doubt upon their testimony.

Gavin testified that he and Gaughan would retain "full censorship rights" (Tr. 3-10, 3-22, 3-23, 3-117, 3-121); that Gaughan would have the right to determine what would be filmed (Tr. 3-102, 3-121) and what could be included in the finished film (Tr. 3-116); that he and Gaughan would have an absolute right to veto any showings of the film if they did not like it (Tr. 3-119); but that no criteria for censorship were established. (Tr. 3-119)

Gavin and Gaughan both testified that Wiseman agreed to obtain releases, in a form approved by the Attorney General (Tr. 4-33, 4-41, 4-153), which they understood would run to the Commonwealth. (Tr. 3-111, 4-149) Gavin's letter (Ex. 4) requesting an opinion of the Attorney General about the filming stated that Wiseman had given assurance that "he will use only the photographs of inmates and patients who are legally competent to sign releases and that he will obtain a written release from each inmate and patient whose photograph is used in the film," and that permission would be granted only if "the rights of the inmates and patients at Bridgewater are fully protected." (Ex. 4, R. 16)

The trial judge found that these conditions — full protection of rights of inmates, using photographs of only inmates legally competent to sign releases, obtaining written releases from each inmate shown in the film, and no showings without approval by Gavin and Gaughan — were agreed to by Wiseman. (R. 44)

Although there is considerable doubt about the credibility of the evidence submitted in support of these findings, for purposes of this petition it will be assumed that in fact those conditions were imposed by the officials and agreed to by Wiseman.

The actual filming at Bridgewater was closely supervised by Gaughan and his staff. A correction officer (guard) accompanied the film crew at all times. (Tr. 4-83, 9-181, 9-182, 10-56) Gaughan gave instructions that no inmate who objected to being filmed should be filmed (Tr. 4-93, 4-97, 10-37, 10-120) and that only consenting inmates should be filmed (Tr. 4-184), and these instructions were followed at all times. (Tr. 4-156, 9-179, 10-121)

During the filming Gaughan (Tr. 10-119), his deputy superintendent (Tr. 9-93, 10-58), and members of the prison staff on numerous occassions (Tr. 6-79, 10-85, 13-105, 13-106, 13-108) directed that specific scenes or particular inmates should not be filmed. The film crew was excluded entirely from one segment of the institution. (Tr. 4-157, 4-158, 9-157)

In fact, no inmate who indicated in any way any objection to being filmed was photographed. (Tr. 4-156, 9-179, 10-121, 13-131, 13-132) No hidden cameras were used at any time (Tr. 7-135) There was no evidence that *any* nonconsenting inmate was filmed at *any* time.

The film crew obtained written releases from more than 100 of the persons filmed (Tr. 7-127, 7-123, 14-65), but not from all persons filmed. (Tr. 7-20, 15-98) On occasion an inmate gave verbal assent to being filmed, or requested that he be filmed, but declined to sign a formal written release. (Tr. 14-141, 6-174, 7-132)

There was evidence at trial that nine specific inmates shown in the film were not mentally competent to understand the nature and quality of a formal written release. (Tr. 8-20, 8-34 to 8-56, 10-201 to 10-204, 11-3 to 11-29).

There was no evidence that any person shown in the film was incompetent to give knowledgeable and effective consent to being photographed and to having his picture used in the completed film, regardless of his capacity to comprehend the nature of a form of written release.

After the film was completed, it was shown to Gaughan (Tr. 4-49, 13-171) and Gavin (Tr. 14-16) and the Attorney General (Tr. 4-54, 11-146, 12-110, 14-6), and Gavin and Gaughan then asserted a right of censorship. (Tr. 14-29, 14-37, 12-120, 12-147, 12-20, 12-93). Bridgewater Film Company, Inc.,[12] made an agreement with Grove Press, Inc., under which Grove would distribute the film, on September 22, 1967 (Tr. 7-64, 14-68), and on the same day this suit was commenced.

## Reasons for Granting the Writ

I. This Case Presents A Novel And Important First Amendment Issue: Can A State Ban The Showing To The Public Of A Documentary Film, Restricting Showings To Professional Audiences Only, Although The Subject Matter Is Of Public Interest And Importance?

The decision of the Supreme Judicial Court of Massachusetts in this case authorizes a unique and pernicious form of censorship. Although the film *Titicut Follies* was held to be a valuable and informative documentary motion picture film, and was conceded to relate to a matter of pub-

[12] Bridgewater Film Company, Inc., was organized in November, 1966 (Tr. 7-39) to handle the commercial aspects of the film (Tr. 7-32), and became the owner of the filmed materials. (Tr. 15-14) The trial court found that in substance this company was controlled by Wiseman. (R. 50) Production of the film cost more than $30,000 (Tr. 14-47, 7-21), and the film makers have received no compensation for their work. (Tr. 7-125, 7-126, 14-50)

lic interest and importance — conditions in a state prison — the Court ruled that the film can be shown only to limited professional-type audiences, and that the general public in the United States must be barred from seeing the film.

If the decision below is permitted to stand, Titicut Follies will be remembered, not as a great documentary film, but as the first film of substantial value and importance ever barred from public exhibition in this country.[13]

As Justice Black observed in his concurring opinion in *Barr* v. *Matteo*, 360 U.S. 564, 577 (1959):

> "The effective functioning of a free government like ours depends largely on the force of an informed public opinion. This calls for the widest possible understanding of the quality of government service rendered by all elective and appointed public officials or employees."

The film here in issue is not alleged or proven to be obscene in any sense, or to be false in any way; it consists only of actual scenes and events filmed and recorded at a state prison in Massachusetts. (Tr. 3-66, 6-4)

The Massachusetts court recognized that conditions at Bridgewater, the institution where the film was made, are of continuing public concern. (A-39) The court also recognized that the film is one of considerable merit:

> "... the film gives a striking picture of life at Bridgewater and of the problems affecting treatment at that or any similar institution. It is a film which would be instructive to legislators, judges, lawyers, sociologists, social workers, doctors, psychiatrists, students in these

[13] Because the Massachusetts courts had personal jurisdiction over the defendants, the injunction is effective throughout the world, and is not limited to the boundaries of Massachusetts.

> or related fields, and organizations dealing with the social problems of custodial care and mental infirmity." (A-42)

The Massachusetts court authorized showing of the film to "audiences of the specialized or professional character" noted above (A-43); but at the same time upheld the trial court's injunction against "exhibition merely to satisfy general public curiosity." (A-43)

This Court of course has recognized that motion picture films are a form of expression and communication protected by the First Amendment. *Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495, 501 (1952); *Interstate Circuit, Inc.* v. *Dallas*, 390 U.S. 676, 682 (1968).

There is no problem here of protecting a class of viewers who might be harmed by seeing the film, *cf. Ginsberg* v. *New York*, 390 U.S. 629, 639 (1968) (sale of obscene materials to children). The court was not concerned with protecting members of the public from the depressing experience of becoming informed about how Massachusetts treats prisoners in the Bridgewater institution.

Instead, the Massachusetts court appeared concerned that "merely curious members of the public" (A-38) might view the film and be unable to comprehend its message properly:

> "The seemingly random and somewhat incoherent sequence of scenes . . . is not likely to confuse seriously interested professional and student audiences. The film, even in its present form, may be highly informative to such specialized audiences." (A-42)

The court also indicated that inmates shown in the film might be less embarrassed if the film were shown only to professional audiences (A-43), presumably because edu-

cated viewers are thought more likely to appreciate the significance of the scenes appearing in the film.

Yet the fundamental purpose of the First Amendment is that there shall be free and unfettered dissemination of information and ideas, about matters of public interest, to the public — to everyone, and not merely to an educated minority or an intellectual elite. This is essential, "to the end that government may be responsive to the will of the people." *DeJonge* v. *Oregon*, 299 U.S. 353, 365 (1937). Motion pictures are "a significant medium for the communication of ideas" because they may "affect public attitudes and behavior in a variety of ways...." *Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495, 501 (1952).

In *Interstate Circuit, Inc.* v. *Dallas*, 390 U.S. 676, 684 (1968), this Court held invalid an imprecise censorship ordinance under which the film maker ran "... the risk of being foreclosed, in practical effect, from a significant portion of the movie-going public." In the present case the film maker has been foreclosed from the most significant portion of the movie-going public — the general mass of voters and taxpayers, whose clamor for reform might bring about changes in institutions such as Bridgewater.

The "market place of ideas"[14] hardly can be expected to function if the great majority of potential buyers are excluded from it.

As one expert witness testified at the trial:

> "There are situations in society which should be examined and improved upon and such examination and improvement can only follow when we have an informed public. One of the social duties of the media is to inform the public on issues which are relevant and important to the life of the society, issues on which

[14] *Time, Inc.* v. *Hill*, 385 U.S. 374, 406 (1967); *cf. Abrams* v. *United States*, 250 U.S. 616, 630 (1919).

> the general public are not otherwise easily able to inform themselves. This film informs the public on such an issue .... Namely, what I consider to be deplorable inadequacies in the treatment of the criminally insane in a state institution." (Tr. 16-125)

The concept of a democratic society is in grave danger when a court undertakes to limit the dissemination of ideas to those individuals deemed specially qualified to comprehend. Should certain books and magazines be made available only to college graduates? Should some judicial decisions be published only for the eyes of judges and members of the bar? In other circumstances, will a court be permitted to enjoin the showing of a film on an important public issue to members of a particular race or religion who might be offended or aroused by it? The petitioners submit that the decision of the Massachusetts court is of such far-reaching implications that it should be reviewed by this Court, and that this Court should rule unequivocally that the public cannot be excluded from seeing a film which relates to a matter of public interest and is neither obscene nor false.

II. This Case Also Presents Another Novel And Important First Amendment Issue: Can A State Ban The Showing To The Public Of A Documentary Film Revealing Conditions In A State Institution On The Theory Of Enforcing Restrictions Imposed Upon The Film Maker By The State As A Condition Of Permitting The Filming?

The Massachusetts trial court found that when permission was granted for filming at Bridgewater, the Massachusetts prison officials who gave that permission imposed certain conditions upon Wiseman, and that he agreed to

them. (R. 43-44) The evidence on this issue was disputed at trial, but for purposes of this petition it will be assumed that the officials did impose the conditions and that Wiseman did indicate assent to them.

The conditions as found by the trial judge were:

> "(a) '... that the rights of the inmates and patients at Bridgewater are fully protected';
> (b) that Wiseman '... would only use the photographs of inmates and patients who are legally competent to sign releases';
> (c) that Wiseman '... will obtain a written release from each patient whose photograph is used in the film'; the form and content of such release to be submitted to and approved by the Attorney General; and
> (d) that the film, after completion, would not be shown or released without first having been viewed and approved by the Commissioner and Superintendent."

On appeal, the Supreme Judicial Court pointed out that it would have been wiser to have reduced any agreement to writing rather than to have risked the misunderstandings possible in oral discussions; said that it was unnecessary to decide "whether the judge on conflicting evidence, largely oral, was plainly wrong in concluding that Mr. Wiseman had agreed to abide completely by the officials' judgment"; and ruled that the trial judge reasonably could conclude that Wiseman agreed to film only inmates legally competent to sign releases (questions of competency to be decided by the Superintendent and his staff), and to obtain a written release from each patient whose photograph was used, and that this was "a part of the arrangement". (A-37)

The Court also said this:

> "Indeed, in view of the character of the film we would not be disposed to give a release (even from an inmate capable of giving one) substantial significance until the inmate giving it had seen the film and fully understood how he was to be portrayed." (A-40, footnote 9)

The condition "that the rights of the inmates and patients at Bridgewater are fully protected" is so vague as to be meaningless (unless it relates to possible invasion of privacy, a matter which is discussed in Section III of this petition).

The condition that the film not be shown or released without having been viewed and approved by the Commissioner and Superintendent is invalid on its face, for lack of any standards or criteria of censorship to be exercised by those officials.[15] (Tr. 3-119) See, e.g., *Niemotko* v. *Maryland,* 340 U.S. 268, 272 (1951); *Kunz* v. *New York,* 340 U.S. 290, 294 (1951); *Staub* v. *City of Baxley,* 355 U.S. 313, 325 (1958); *Interstate Circuit* v. *Dallas,* 390 U.S. 676, 684 (1968).

Thus the Commonwealth's right to enjoin the film for violation of conditions imposed on the film maker must depend upon the validity or invalidity of the conditions that only persons competent to sign releases be filmed. and that only persons who had signed releases be shown in the completed film. Can a state impose such conditions on a film maker and then enjoin exhibition of the film if the conditions are not met?

It is established by decisions of this Court that where a state grants a license or permission upon a condition repugnant to the Constitution, such condition cannot be en-

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[15] In this instance, the very persons charged with responsibility for the operations of the Bridgewater institution, who would not be likely to have an objective point of view.

forced, even if the state were free to withhold the license or permission entirely. *W. W. Gargill Co.* v. *Minnesota*, 180 U.S. 452, 468 (1901); *Frost & Frost Trucking Co.* v. *Railroad Commission of California*, 271 U.S. 583, 593 (1926). The principle seems to have been applied, at least by implication, in recent cases involving the First Amendment. See, e.g., *Pickering* v. *Board of Education*, 391 U.S. 563, 568 (1968) (school teacher dismissed for writing letter to newspaper); *Bynum* v. *Schiro*, 219 F. Supp. 204, 210 (E.D.La. 1963), *affirmed* 375 U.S. 395 (1964) (lease of city auditorium conditioned on submission of names of speakers for approval).

However, the present case is unique in that the state here has enjoined distribution of a film on the theory that defendants failed to comply with conditions imposed by the state in permitting the film to be made.[16] (It must be noted that this is not a case of a contract between private citizens, which might present different issues.)

The petitioners submit that the conditions imposed by the Commonwealth, as to filming only competent persons and using pictures of only those who signed written releases, should be held unenforceable. Those conditions, if enforced, would have a chilling effect upon the constitutional rights of the defendants.

No "releases" in the sense of documents protecting the Commonwealth from liability could be significant for that purpose. The Commonwealth is immune from tort liability. *Smith* v. *Commonwealth*, 347 Mass. 453, 461 (1965). In substance, what was required was written permission from

[16] At trial the Commonwealth asserted a right to bar the press from the Bridgewater institution entirely. It seems at least doubtful whether the Commonwealth could exclude a documentary film maker from the institution, at least if the filming could be accomplished, as here, without interfering with operations of the institution. *Cf. Estes* v. *Texas*, 381 U.S. 532 (1965) with *Tinker* v. *Des Moines Community School District*, 393 U.S. 503 (1969).

each individual filmed, without regard to liability for publication.

If the state can require that a film maker shall obtain written permission to use the photograph of any person shown in a documentary film on a matter of public interest, then in practical effect an absolute power of censorship — without any standards or criteria — is vested in those persons who are participants in newsworthy events. The implications of such a doctrine — for the newspaper reporter and newsreel cameraman as well as the documentary film maker — deserve serious consideration.

In order to make a meaningful disclosure of conditions in an institution such as Bridgewater, the film maker might reasonably deem it appropriate to film persons who lacked the educational background or degree of sagacity required to comprehend the nature of a formal written release. If the conditions here imposed by the state are enforceable, he would be precluded from using the photographs of inmates who were mentally incompetent to understand the nature of a release, who were illiterate, or who might decline to sign a release for fear of retribution at the hands of prison authorities.[17] Yet surely the interests of society in being informed about conditions in an institution such as Bridgewater include a legitimate interest in how the state treats those persons least able to protect themselves—the mentally incompetent, the illiterate, and the intimidated—who are unable or unlikely to provide valid written releases.

The conditions imposed by the state also would preclude the film maker from using any group scene recorded on film, however significant or important it might appear, unless each inmate in the scene had signed a release. Such

[17] For example, at least one inmate expressly requested that his picture be used, but refused to sign a written release. (Tr. 6-170, 6-174, 7-132, 14-141)

conditions also would require the constant interruption of filming in order to obtain signed releases, thus distorting the activities to be filmed and impairing the fidelity of the film to reality.

In the present case, Wiseman failed to obtain written releases from a number of inmates who appear in scenes in the finished film (A-41), but no person who objected to being filmed was in fact filmed at any time. (Tr. 4-156, 10-121, 13-131, 13-132)

The potential dangers to freedom of the press in permitting a state to enforce conditions such as those in issue is emphasized by the facts of the present case, where the film maker was proceeding on the basis of a written opinion of the Attorney General of the Commonwealth stating that consenting inmates could be filmed and implying that releases would not be necessary (Ex. 5) (Tr. 14-58), and where the Commonwealth relied upon testimony of state officials as to oral discussions to prove the imposition of the conditions in issue.

This Court should grant the present petition for the purpose of deciding whether or not the state may require a film maker to obtain written releases from persons shown in a documentary film, on peril of having exhibition of the film enjoined. The decision will be of importance not only to all documentary film makers, but also to motion picture and television newscasters throughout the United States.

III. The Decision of the Massachusetts Court Conflicts With the Principles of *Time, Inc.* v. *Hill*, 385 U.S. 374 (1967).

The petitioners submit that review should be granted in order that this Court may consider whether, or to what extent, the Massachusetts trial and appellate courts have

failed to apply the principles established by this Court in *Time, Inc.* v. *Hill,* 385 U.S. 374 (1967).

The film here in issue consists in part of scenes in which inmates of the Bridgewater prison who manifest indications of mental disturbances are shown. A few very brief scenes show inmates who are naked or only partially clothed. Such scenes are an integral and essential part of the film, because the abysmal conditions under which such persons are held in custody obviously are a major concern of the film maker.

*Cullen* v. *Grove Press, Inc.,* 276 F. Supp. 727 (S.D.N.Y. 1967) was an earlier decision involving the same film here in issue.[18] In that case four prison guards from Bridgewater sought an injunction against distribution and exhibition of the film. Relying upon the decision of this Court in the *Hill* case, the United States District Court denied a motion for preliminary injunction:

> ". . . plaintiffs' motion must be denied unless 'Titicut Follies' is a false report of conditions at Bridgewater, made with knowledge of its falsity or in reckless disregard of the truth."[19] (A-69)

The case later was dismissed by stipulation of all parties, and no appeal was taken.[20]

The Massachusetts Supreme Judicial Court considered the *Cullen* decision, correctly pointed out that the plaintiff guards had not purported to represent the interests of the inmates of Bridgewater, and said:

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[18] The full text of this decision is printed as Appendix E to this petition.

[19] *Cf. Time, Inc.* v. *Hill,* 385 U.S. 374, 387-388 (1967).

[20] It is not known to what extent, if at all, the plaintiff prison guards may have been inspired to commence the federal action by their superiors in the Massachusetts prison system.

"We, in any event, decline to follow the broad interpretation given in the *Cullen* case to *Time, Inc.* v. *Hill.* . . ." (A-42)

The petitioners submit that the federal court properly construed and applied the *Hill* case, and that the Massachusetts court erred in failing to give a proper interpretation to *Hill.*[21]

It would seem that the present case falls well within the scope of the decision in *Hill,* where an award of damages under the New York privacy statute to James Hill and members of his family who "involuntarily became the subjects of a front-page news story after being held hostage by three escaped convicts", 385 U.S. at 378, and whose experiences later were inaccurately described in an article in *Life* magazine, was set aside; this Court ruled that the First Amendment freedoms precluded application of the New York statute "in the absence of proof that the defendant published the report with knowledge of its falsity or in reckless disregard of the truth." 385 U.S. at 387-388.

Surely the fate of hundreds of men confined in a medieval institution in Massachusetts is of greater public interest and concern than what happened to James Hill and his family.

The trial judge in the present case ruled that the film was "an unwarranted and illegal intrusion by Wiseman into the lives and right to privacy of each inmate and patient who is pictured there" (R. 54), and concluded that "These persons have an absolute right, subject only to the

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[21] At another point in its opinion in the present case, the Massachusetts court said: "The case is distinguishable from decisions which have permitted publication of newsworthy events where the public interest in reasonable dissemination of news has been treated as more significant than the private interests in privacy. *Cf. Time, Inc.* v. *Hill,* 385 U.S. 374, 380-391. . . ." (A-41)

necessary procedures for internal security, and for their care, custody, and treatment, to be left alone." (R. 54)

The conclusion that the inmates of Bridgewater have "an absolute right to be left alone" ignores entirely the message of the film—that these inmates have a right *not* to be left alone, a right *not* to be abandoned by society, a right *not* to be cast into ancient cellblocks and left there without even minimal care or treatment until death.

On appeal, the Supreme Judicial Court upheld the trial court's ban against showing the film to the general public, in part "to protect interests of the inmates in privacy." (A-41). The appellate court ruled that there had been "a collective, indecent intrusion into the most private aspects of the lives of these unfortunate persons" (A-37), that the Commonwealth of Massachusetts had standing to seek injunctive relief on behalf of the inmates (A-39), and that "Recognizable pictures of individuals, although perhaps resulting in more effective photography, were not essential." (A-40)

It will be apparent to anyone who sees the film that the elimination of identifiable photographs of individuals would leave a film which would be drab, insipid, and substantially worthless as a means of communicating the despair of the inmates to a viewer.

By enjoining public showings of the film on the basis of a theory of invasion of privacy, the Massachusetts court wrote a new chapter in the annals of state censorship. Until the decision below, it had been generally recognized by both state and federal courts that the right to privacy has no application to a matter of public interest, even when the individual involved becomes a matter of public interest because he is the involuntary victim of the acts of others. See, e.g., *Jenkins* v. *Dell Pub. Co.*, 251 F. 2d 447 (3d Cir. 1958), *cert. denied* 357 U.S. 921. Even

when the right to privacy first was recognized, it was acknowledged that "The right to privacy does not prohibit any publication of matter which is of public or general interest." Warren and Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193, 214 (1890).

As this Court stated the proposition in *Time, Inc.* v. *Hill*, 385 U.S. 374, 388 (1967):

> "Exposure of the self to others in varying degrees is a concomitant of life in a civilized community. The risk of this exposure is an essential element in a society which places a primary value on freedom of speech and press."

Of course in reality it is not the privacy of the inmates of the Bridgewater institution, but the privacy of the Commonwealth of Massachusetts and its officials, which is protected by the decision below:

1. At the trial of the case, there was no evidence that any inmate, or any friend or relative of any inmate, had made any objection to public showing of the film; nor was there any evidence that any inmate shown in the film was likely to be recognized by anyone outside the walls of the institution.

2. As a practical matter, an inmate of Bridgewater has no "private life." He is exposed to the constant observation of prison guards and other inmates, as well as large groups of persons who regularly are permitted to tour the institution. (Tr. 3-133, 13-12, 13-83 to 13-85)

3. The Massachusetts courts made no attempt to impose any geographical limitations upon exhibition of the film, although it would appear obvious that no embarrassment could be caused to any inmate if the film were shown to the public at places remote from Massachusetts. (The

injunction against public showings is effective throughout the world, and in no way limited to Massachusetts.)

4. The Supreme Judicial Court ruled that even when the film is shown to limited professional audiences, there must be included "a brief explanation that changes and improvements have taken place in the institution since 1966" (A-43), although the trial judge made no such findings, the record does not support such a statement, and the defendants have serious doubts about the accuracy of the statement. The inclusion of such a statement can be of no conceivable benefit to the inmates of Bridgewater, and serves only to protect the image of the Commonwealth of Massachusetts.

5. The potential benefits to inmates of Bridgewater and similar institutions, from reforms which might be engendered by showing this film to the public, would seem to far outweigh any harm which could be caused to anyone shown in the film.[22]

Thus the only interest actually protected by the injunction is the interest of the Commonwealth of Massachusetts and its officials in having the public remain in ignorance of how Massachusetts treats the inmates of its institution.

## CONCLUSION

For the reasons above set forth, the petitioners submit that a writ of certiorari should issue, directed to the Supreme Judicial Court of the Commonwealth of Massachusetts, in order that this Court may rule upon the important issues of freedom of speech and press presented in this case.

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[22] Removal of the injunctive ban against the film would not affect the right of any person shown in the film to sue for money damages, although recovery of damages might be barred by the doctrine of *Time, Inc.* v. *Hill*, 385 U.S. 374 (1967).

Respectfully submitted,

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# APPENDIX A

## Opinion of the Supreme Judicial Court of Massachusetts

S-7205

COMMONWEALTH AND OTHERS

*vs.*

FREDERICK WISEMAN AND OTHERS.[1]

CUTTER, J. This bill seeks, among other relief, to enjoin all showings of a film entitled "Titicut Follies," containing scenes at Massachusetts Correctional Institution at Bridgewater (Bridgewater), to which insane persons charged with crime and defective delinquents may be committed. See G. L. c. 125, § 19, as amended through St. 1967, c. 619, § 2. The film was made between April 22, and June 29, 1966. Mr. Wiseman and Bridgewater Film Company, Inc. (BFC) appeal from an interlocutory decree, an order for a decree, and the final decree which enjoins showing the film "to any audience" and requires Mr. Wiseman and BFC to deliver up to the Attorney General for destruction specified films, negatives, and sound tapes. The plaintiffs appeal from the final decree because it did not order sums realized by various defendants from showing the film to be held for distribution as the court might direct.

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[1] The other plaintiffs are Charles W. Gaughan, as Superintendent, Massachusetts Correctional Institution, Bridgewater; John A. Gavin, Commissioner of Correction, and James C. Bulcock (an inmate of Bridgewater) by Gaughan as his guardian. The defendants, other than Mr. Wiseman, are Bridgewater Film Company, Inc. (BFC), Grove Press, Inc. (Grove), and Titicut Follies Film Distributing Company, Inc. (TFFDC). The proceedings against Mr. Wiseman and BFC, on November 17, 1967, were severed from those against Grove and TFFDC, each a New York corporation. The case proceeded only against Mr. Wiseman and BFC. Mr. Wiseman organized BFC on November 14, 1966. The judge concluded that it was "merely an instrument created . . . for the . . . commercial exploitation of the film" and is essentially Mr. Wiseman's alter ego.

The trial judge made a report of material facts. The evidence (2,556 pages of proceedings on eighteen trial days and sixty-four exhibits) is reported. The facts, except as otherwise indicated, are stated on the basis of the trial judge's findings and certain exhibits. The film has been shown to the Justices participating in this decision.

In 1965, Mr. Wiseman first requested permission from the Superintendent and from the Commissioner to make an educational documentary film concerning Bridgewater. His first request was denied. On January 28, 1966, permission was granted, subject to the receipt of a favorable opinion from the Attorney General (that the officials could grant permission) and to the conditions (a) that "the rights of the inmates and patients . . . [would be] fully protected," (b) that there would be used only "photographs of inmates and patients . . . legally competent to sign releases," (c) that a written release would be obtained "from each patient whose photograph is used in the film," and (d) that the film would not be released "without first having been . . . approved by the Commissioner and Superintendent." The existence of the final condition was the subject of conflicting evidence but there was oral testimony upon which the trial judge could reasonably conclude that it had been imposed.

The then Attorney General (Mr. Brooke) on March 21, 1966, advised that "the Superintendent may, if he deems it advisable; permit Mr. Wiseman to make his film at" Bridgewater. Permission was then given.

In April, 1966, Mr. Wiseman and his film crew started work at Bridgewater. They were given free access to all departments except the treatment center for the sexually dangerous, whose director made "strong objections" in writing to any photography there without compliance with explicit written conditions. In three months, 80,000 feet of film were exposed. Pictures were made "of mentally in-

competent patients . . . in the nude . . . [and] in the most personal and private situations."

In approaching the Commissioner and the Superintendent, Mr. Wiseman had indicated that he planned a documentary film about three people: an adult inmate, a youthful offender, and a correctional officer. It was to be an effort "to illustrate the various services performed — custodial, punitive, rehabilitative, and medical." The judge concluded (a) that the "plain import of [Mr.] Wiseman's representations was that his film was to be . . . non-commercial and non-sensational," whereas, in the judge's opinion, it was "crass . . . commercialism"; (b) that, in fact, the film "constitutes a most flagrant abuse[2] of the privilege . . . [Mr. Wiseman] was given"; and (c) that, instead of "a public service project," the film, as made, is "to be shown to the general public in movie houses."

The Superintendent first saw the film on June 1, 1967, and objected, among other things, "to the excessive nudity." The then Attorney General (Mr. Richardson) also saw the film in June, 1967, and raised several questions. At a conference on September 21, 1967, Mr. Wiseman and his legal advisers were told by the Attorney General "that in his opinion the film constituted an invasion of the privacy of the inmates shown in the film; that mentally incompetent patients were shown . . . and that the releases, if any, obtained by [Mr.] Wiseman were not valid." The Commissioner saw the film "for the first time on . . . September 21,

[2] Among the findings are the following: The film "is a hodge-podge of sequences . . . depicting mentally ill patients engaged in repetitive, incoherent, and obscene rantings. . . . The film is excessively preoccupied with nudity. . . . [N]aked inmates are shown desperately attempting to hide . . . their privates with their hands. . . . There is a scene of . . . [a priest] administering the last rites of the church to a dying patient [and] the preparation of a corpse for burial. . . . A . . . patient, grossly deformed by . . . congenital brain damage, is paraded before the camera."

1967." On the next day, he notified Mr. Wiseman "that the film could not be shown 'in its present form.' "

In September, 1967, Mr. Wiseman made an agreement with Grove for distribution of the film for "showing to the general public . . . throughout the United States and Canada," with Mr. Wiseman to receive "50% of the theatrical gross receipts, and 75% from any television sale." Grove, for promotion of the film, was to have complete control of the manner and means of distribution." The film was shown privately, and to the public for profit, in New York City in the autumn of 1967.

The trial judge ruled, inter alia, (a) that such "releases as may have been obtained [from inmates] are a nullity"; (b) "that the film is an unwarranted . . . intrusion . . . into the . . . right to privacy of each inmate" pictured, degrading "these persons in a manner clearly not warranted by any legitimate public concern"; (c) that the "right of the public to know" does not justify the unauthorized use of pictures showing identifiable persons "in such a manner as to . . . cause . . . humiliation"; (d) that "it is the responsibility of the State to protect" the inmates "against any such . . . exploitation"; and (e) that the Commonwealth is under "obligation . . . to protect the right of privacy of those . . . committed to its . . . custody."[3]

Reactions to the film set out in the record vary from the adversely critical conclusions of the trial judge to those expressed by witnesses[4] who regarded it as fine journal-

[3] The judge ruled that the Commissioner and the Superintendent, as individuals and as officials, had no standing as plaintiffs; that an inmate, through the Superintendent as his guardian, could be a plaintiff; and that the Commonwealth could seek injunctive relief, both as a party to the contract made with Mr. Wiseman and in behalf of the inmates.

[4] Witnesses who regarded the film as valuable included a professor of sociology at the Harvard Law School, the film critic for Life (the magazine), the retired director of the Nieman Fellowships at Harvard, the dean of the Boston Uni-

istic reporting, as education, and as art.[5] The Attorney General (Mr. Richardson) testified that the film "was impressive in many ways . . . powerful in impact." He, however, expressed concern about the problem of obtaining valid releases, even from those "conceivably competent," since the releases would have been given before the inmates "could have any idea how they would be depicted." There was testimony from experts about the value of the film for instruction of medical and law students, and "exposure of conditions in a public institution."[6]

1. We are in as good a position as the trial judge to appraise the film and to determine to what extent (a) its exhibition may invade rights of inmates to privacy, or (b) its suppression may interfere with countervailing in-

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versity School of Public Communications, an associate professor of psychiatry at Tufts Medical School, a professor of law at Yale, and others.

[5] For example the Life review said, in part, "The Bridgewater atmosphere is one of aimless hopelessness. . . . A psychiatrist turns an interview with an inmate into a sadistic baiting, or, with malicious cheerfulness, force-feeds a dying old man, while we wonder whether the ash from the doctor's carelessly dangling cigarette is really going to fall into the glop being funneled into the convulsively shuddering throat. A society's treatment of the least of its citizens . . . is perhaps the best measure of its civilization. The repulsive reality . . . forces us to contemplate our capacity for callousness. No one seeing this film can but believe that reform of the conditions it reports is urgent business. . . . We cannot forget that . . . [the] 'actors' are there to stay, trapped in their own desperate inventions. When a work achieves that kind of power, it must be regarded as art. . . ."

[6] The former director of the division of legal medicine of the State Department of Mental Health, now teaching at the Tufts Medical School, in a letter in evidence, commented, "Even though I was an experienced psychiatrist and had . . . worked on violent . . . mental hospital wards and maximum security prisons, Bridgewater was the first institution where I ever felt personally in danger. My reaction . . . would border on despair each time I went. When I would leave I would quickly put the place out of my mind. . . . [T]he film in . . . [a] painful way revived the old feelings of depression and . . . anger at

terests. We may reach our conclusions about the film as documentary evidence, unaffected by findings by the trial judge. See *Berry* v. *Kyes*, 304 Mass. 56, 57-58; *Skil Corp.* v. *Barnet*, 337 Mass. 485, 488; *F. A. Bartlett Tree Expert Co.* v. *Barrington*, 353 Mass. 585, 586, fn. 1. As to findings based in part upon oral evidence, we decide the case according to our judgment, giving due weight to the judge's findings according to our usual standards of review. See *Lowell Bar Assn.* v. *Loeb*, 315 Mass. 176, 178; *Jones* v. *Jones*, 349 Mass. 259, 261-262. See also *Colbert* v. *Hennessey*, 351 Mass. 131, 134.

2. The Commissioner and the Superintendent would have acted wisely if they had reduced any agreement to writing rather than to have risked the misunderstandings possible in oral discussions. They also might have avoided dispute if they had supervised the filming itself much more closely. We, however, need not decide whether the judge on conflicting evidence, largely oral, was plainly wrong in concluding that Mr. Wiseman had agreed to abide completely by the officials' judgment. We think that, in any event, he did not comply adequately with at least two other conditions reasonably imposed upon him before permission to make the film was granted.

Early in the negotiations, Mr. Wiseman represented in writing that only pictures of inmates "legally competent to sign releases" would be used and that the "question of competency would . . . be determined by the Superintendent and his staff." In the 1966 request for the Attorney General's opinion, Mr. Wiseman was quoted as giving assurance that a written release would be obtained "from each . . . patient whose photograph is used." The latter assur-

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myself for continuing to ignore the problem. . . . [I]n a small way my reactions are a clue to why [such] institutions . . . exist. There are some things we prefer not to know about . . . not too unlike the Germans who lived near Dachau."

ance was quoted in the opinion (March 21, 1966) stating that the Superintendent had power to permit the film to be made. In the circumstances, the judge reasonably could conclude that these representations were a part of the arrangement.

The judge was also clearly justified in deciding on the basis of expert testimony, that some of sixty-two inmates identified as shown in the film were incompetent to understand a release and, on the basis of a stipulation, that releases were obtained only from eleven or twelve of the numerous inmates depicted. There was ample basis for concluding that Mr. Wiseman had not fulfilled important undertakings clearly designed to assure that the film would show only those consenting in writing to their appearance in the film and competent to understand and to give such consent.

3. The film shows many inmates in situations which would be degrading to a person of normal mentality and sensitivity. Although to a casual observer most of the inmates portrayed make little or no specific individual impression, others are shown in close-up pictures. These inmates are sufficiently clearly exhibited (in some instances naked) to enable acquaintances to identify them. Many display distressing mental symptoms. There is a collective, indecent intrusion into the most private aspects of the lives of these unfortunate persons in the Commonwealth's custody.

We need not discuss to what extent in Massachusetts violation of privacy will give rise to tort liability to individuals. See *Frick* v. *Boyd,* 350 Mass. 259, 264, and cases cited; Restatement 2d: Torts (Tent. draft No. 13, April 27, 1967), §§ 652D-652E. See also Warren and Brandeis, The Right to Privacy, 4 Harv. L. Rev. 193; and (for references to more recent articles) Kalven, Privacy in Tort Law — Were Warren and Brandeis Wrong? 31 Law & Contemp. Prob.

326. We think, in any event, that Mr. Wiseman's massive, unrestrained invasion of the intimate lives of these State patients may be prevented by properly framed injunctive relief. The Commonwealth has standing and a duty to protect reasonably, and in a manner consistent with other public interests, the inmates from any invasions of their privacy substantially greater than those inevitably arising from the very fact of confinement. See *Ex parte Sturm,* 152 Md. 114, 119-120.

There is a "general power of the Legislature, in its capacity as parens patriae, to make suitable provision for incompetent persons." A "comprehensive system for their care and custody" is contained in G. L. c. 123. See *Dubois, petitioner,* 311 Mass. 575, 578-579. See also *Shapley* v. *Cohoon,* 258 Fed. 752, 755 (D. Mass.), remanded on other grounds 255 Fed. 689 (1st Cir.). The Legislature has exercised that power with specific reference to Bridgewater, among other institutions. See G. L. c. 125, § 14 (as amended through St. 1957, c. 777, § 5), § 18 (inserted by St. 1955, c. 770, § 11), § 19 (as amended through St. 1967, c. 619, § 2). These general provisions import all reasonable power, and the duty, to exercise proper controls over the persons confined and the conditions of their custody (cf. *Maas* v. *United States,* 371 F. 2d 348 [Ct. App. D.C.]) and to afford the inmates protection and kindness consistent with the terms and rehabilitative purposes of their commitments. See G. L. c. 127, § 32 (as amended through St. 1957, c. 777, § 11). The Commissioner and Superintendent, under reasonable standards of custodial conduct, could hardly permit merely curious members of the public access to Bridgewater to view directly many activities of the type shown in the film. We think it equally inconsistent with their custodial duties to permit the general public (as opposed to members of groups with a legitimate, significant, interest) to view films showing inmates naked or exhibiting painful aspects of

mental disease. See *York* v. *Story*, 324 F. 2d 450, 454-456 (9th Cir.), cert. den. 376 U. S. 939. See also *Myers* v. *Afro-Am. Publishing Co. Inc.* 168 Misc. (N. Y.) 429, 430-431 (Supr. Ct.), affd. 255 App. Div. (N. Y.) 838; *Myers* v. *United States Camera Publishing Corp.* 9 Misc. 2d 765, 766-768 (N. Y. City Ct.); 1934 Op. N. Y. Atty. Gen. pp. 374, 375.

These considerations, taken with the failure of Mr. Wiseman to comply with the contractual condition that he obtain valid releases from all persons portrayed in the film, amply justify granting injunctive relief to the Commonwealth. The impracticality of affording relief to the inmates individually also supports granting this collective relief to the Commonwealth as parens patriae, in the interest of all the affected inmates. We give no weight to any direct interest of the Commonwealth itself in suppressing the film.[7]

4. The defendants contend that no asserted interest of privacy may be protected from the publication of this film because the conditions at Bridgewater are matters of continuing public concern, as this court has recognized. See *Nason* v. *Commissioner of Mental Health*, 351 Mass. 94, 98; *Nason* v. *Superintendent of Bridgewater State Hosp.* 353 Mass. 604, 606-614.[8] Indeed, it was concern over conditions at Bridgewater which led various public officials in 1965

[7] Compare the intimations in *Kelley* v. *Post Publishing Co.* 327 Mass. 275, 278, and *Brauer* v. *Globe Newspaper Co.* 351 Mass. 53, 58, denying any direct right of privacy in any person other than the immediate victim. These intimations seem inapplicable to the quasi-fiduciary interests asserted by the Commonwealth. These interests, we assume, are not a matter of Federal law as to content and protection, but are "left largely to the law of" Massachusetts. See *Katz* v. *United States*, 389 U. S. 347, 350-351.

[8] The latter case, decided February 5, 1968, discloses (see pp. 609, esp. fn. 6, and 611) some improvements in conditions at Bridgewater during 1967, the year after the film was made. In the present case, also, there was testimony, for example, that, after the film was completed, thirty-eight officers, fifty-five other persons engaged in rehabilitation, and three doctors had been added to the pre-existing Bridgewater staff.

and 1966 to consider a documentary film, in the hope that, if suitable, it might arouse public interest and lead to improvement.

Even an adequate presentation to the public of conditions at Bridgewater, however, would not necessitate the inclusion of some episodes shown in the film, nor would it justify (cf. *Travers* v. *Paton*, 261 F. Supp. 110, 116-117 [D. Conn.]) the depiction of identifiable inmates, who had not given valid written consents and releases, naked or in other embarrassing situations. We agree with the trial judge that Mr. Wiseman's wide ranging photography amounted to "abuse of the privilege he was given to make a film" and a serious failure to comply with conditions reasonably imposed upon him.[9] Mr. Wiseman could hardly have fairly believed that officials, solicitous about obtaining consent and releases from all inmates portrayed, could have been expected to approve this type of film for general distribution.

The record does not indicate to us that any inmate shown in the film, by reason of past conduct, had any special news interest as an individual. Each inmate's importance to the film was that he was an inmate of Bridgewater, that he suffered from some form of mental disease, and that he was undergoing in the Bridgewater facilities particular types of custody and treatment. Recognizable pictures of individuals, although perhaps resulting in more effective photography, were not essential. In the circumstances,

[9] Even if no person portrayed objected to being photographed and even if no pictures were taken of persons who did object, the requirement of releases from persons competent to give them does not seem to us unreasonable. Cf. *Thayer* v. *Worcester Post Co.* 284 Mass. 160, 163-164; *Marek* v. *Zanol Prod Co.* 298 Mass. 1, 3-4. Indeed, in view of the character of the film, we would not be disposed to give a release (even from an inmate capable of giving one) substantial significance until the inmate giving it had seen the film and fully understood how he was to be portrayed.

there will be no unreasonable interference with any publication of matters of public concern if showing the film to the general public is prevented (a) to protect interests of the inmates in privacy, and (b) because Mr. Wiseman went unreasonably beyond the scope of the conditional permission to enter, and take pictures upon, State owned premises properly not generally open for public inspection and photography. See *Adderley* v. *Florida,* 385 U. S. 39, 41, 47-48.

The case is distinguishable from decisions which have permitted publication of newsworthy events where the public interest in reasonable dissemination of news has been treated as more significant than the private interests in privacy. Cf. *Time, Inc.* v. *Hill,* 385, U. S. 374, 380-391; *Jenkins* v. *Dell Publishing Co. Inc.* 251 F. 2d 447, 450-452 (3rd Cir.), cert. den. 357 U. S. 921; *Mahaffey* v. *Official Detective Stories, Inc.* 210 F. Supp. 251, 253 (W. D. La); *Hurley* v. *Northwest Publications, Inc.* 273 F. Supp. 967, 976 (D. Minn.), affd. 398 F. 2d 346 (8th Cir.). Cf. also *Kelley* v. *Post Publishing Co.* 327 Mass. 275, 278; *Spahn* v. *Julian Messner, Inc.* 21 N. Y. 2d 124, 127-129 (decided after *Julian Messner, Inc.* v. *Spahn* 387 U. S. 239). We need not now consider to what extent Mr. Wiseman could have been wholly excluded from making a film at Bridgewater. In this aspect of the case, we hold merely that he violated the permission given to him, reasonably interpreted, and did not comply with valid conditions (cf. note, 73 Harv. L. Rev. 1595, 1599-1602) that he obtain written releases.[10]

[10] The record suggests that Mr. Wiseman, who spent much uncompensated time and about $32,000 in the production, not only was interested in recovering his costs (which he apparently had not done at the time of trial) but also in entering the picture in various cinema art competitions. Mr. Wiseman doubtless desired to produce an effective "documentary," or a work of art which would win awards, or a film which would attract public patronage. In our opinion, no one of these purposes would justify the violation of the conditions or of the

We are aware, of course, that in *Cullen* v. *Grove Press, Inc.* 276 F. Supp. 727, 729-731 (S.D. N.Y.), a preliminary injunction against showing the film generally to the New York public was denied when such relief was sought by correction officers at the institution. The then plaintiffs, however, did not represent the inmates as the Commonwealth (as parens patriae) does in this case. We, in any event, decline to follow the broad interpretation given in the *Cullen* case to *Time, Inc.* v. *Hill,* 385 U. S. 374, 387-388.

5. That injunctive relief may be granted against showing the film to the general public on a commercial basis does not mean that all showings of the film must be prevented. As already indicated (see e.g. fns. 5, 6), the film gives a striking picture of life at Bridgewater and of the problems affecting treatment at that or any similar institution. It is a film which would be instructive to legislators, judges, lawyers, sociologists, social workers, doctors, psychiatrists, students in these or related fields, and organizations dealing with the social problems of custodial care and mental infirmity. The public interest in having such persons informed about Bridgewater, in our opinion, outweighs any countervailing interests of the inmates and of the Commonwealth (as parens patriae) in anonymity and privacy.

The effect upon inmates of showing the film to persons with a serious interest in rehabilitation,[11] and with potential

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proper interests of the inmates. This is not an instance (cf. *Attorney Gen.* v. *The Book Named "Tropic of Cancer,"* 345 Mass. 11, 20) where judges or administrators may be regarded as attempting to be "arbiters of taste" or to determine for a producer what is "unnecessary" to his portrayal of particular scenes. Relief here is granted solely to afford protection to interests entitled to protection.

[11] The seemingly random and somewhat incoherent sequence (see fn. 2) of scense, probably designed to give to the film an impressionistic character, is not likely to confuse seriously interested professional and student audiences. The film, even in its present form, may be highly informative to such specialized audiences.

capacity to be helpful, is likely to be very different from the effect of its exhibition merely to satisfy general public curiosity. There is possibility that showings to specialized audiences may be of benefit to the public interest, to the inmates themselves, and to the conduct of an important State institution. Because of the character of such audiences, the likelihood of humiliation, even of identifiable inmates, is greatly reduced. In any event the likelihood of harm seems to us less than the probability of benefits.[12]

6. We think that the final decree (unrestricted as it is as to time, geographical scope, and audience) is too sweeping and that more precise and restricted relief against showing the film, and the dissemination of the information contained in it, is necessary. See the analogy of *Carroll* v. *President & Commrs. of Princess Anne,* 393 U. S. 175, 183-184. See also *Cox* v. *Louisiana,* 379 U. S. 536, 555-558; *United States* v. *Robel,* 389 U. S. 258, 265-266. The decree is to be modified to permit (according to standards to be defined in the decree) the showing of the film to audiences of the specialized or professional character already mentioned.

Mr. Wiseman, or those claiming through him, may make a charge for use of the film, so far as showing it may be permitted by the modified decree. In view of the lapse of time since the film was made, the modified decree should fairly require including in the film, for all permitted showings, a brief explanation that changes and improvements have taken place in the institution since 1966.

7. We perceive no reason for ordering destruction of film footage not included in the film exhibited to us. The

[12] This type of balancing of conflicting public and private interests is generally comparable to that which may affect regulation of court room photography and television or the restriction of pre-trial publicity in criminal cases. Cf. *Tribune Review Publishing Co.* v. *Thomas,* 153 F. Supp. 486, 494-495 (W.D. Pa.), affd. 254 F. 2d 883, 884 (3rd Cir.).

decree should be modified to permit preservation of this material at the expense of Mr. Wiseman, if he wishes to save it, provided that no use shall be made of this material without the approval of the Superior Court.

8. The court shall retain jurisdiction of the case for the granting of such supplemental relief as from time to time may be appropriate under the modified decree.

9. The trial judge stated that the plaintiffs "do not seek any award of compensatory damages" for the violation of the inmates' rights to privacy. In any event, the present record is not an appropriate basis for a recovery by any particular inmate who may have suffered ascertainable damage. Indeed, the film may indirectly have been of benefit to some inmates by leading to improvement of Bridgewater. Injunctive relief affords the inmates the most effective, and probably the only useful, protection which can be given. We perceive no occasion for imposing, as the Commonwealth urges, a constructive trust upon receipts for past showings of the film.

10. The interlocutory decree with respect to the demurrer is affirmed. The final decree is reversed in order to permit its modification. A modified decree, consistent with this opinion, is to be entered. The Commonwealth is to have costs of appeal.

*So ordered.*

# APPENDIX B

## Opinion of the Superior Court of Massachusetts

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPERIOR COURT
IN EQUITY
No. 87538

COMMONWEALTH OF MASSACHUSETTS, et al
*v.*
FREDERICK WISEMAN, et al

*FINDINGS, RULINGS AND ORDER FOR DECREE*

The following is a summary of the facts found by the court.

1. On January 28, 1966, the respondent Frederick Wiseman (Wiseman), in response to his request (after a denial of his previous request in September, 1965, Exhibits Nos. 1, 1A, 2 & 3), received permission from the petitioner John A. Gavin, Commissioner of Correction (Commissioner), and the petitioner Charles A. Gaughan, Superintendent of the Massachusetts Correctional Institution at Bridgewater (Superintendent), to make an "Educational Television Documentary" film at Bridgewater, subject, in the first instance, to a favorable legal opinion from the Attorney General that these officials had the power to give such permission, and subject further to the following conditions:

(a) ". . . that the rights of the inmates and patients at Bridgewater are fully protected";

(b) that Wiseman ". . . would only use the photographs of inmates and patients who are legally competent to sign releases";

(c) that Wiseman ". . . will obtain a written release from each patient whose photograph is used in the film"; (the form and content of such release to be submitted to and approved by the Attorney General); and

(d) that the film, after completion, would not be shown

or released without first having been viewed and approved by the Commissioner and Superintendent.

Wiseman agreed to each of the foregoing conditions. See Exhibits Nos. 4 & 5.

2. Upon receipt of a favorable opinion from the Attorney General, dated March 21, 1966, that the Superintendent had the power to grant Wiseman permission to make the film, the Superintendent and the Commissioner gave Wiseman such permission (Exhibit #5A), subject to the previously stated conditions, to which Wiseman agreed.

3. The conclusion that Wiseman agreed to all of the foregoing conditions is buttressed (a) by the conditions expressly stated in the Attorney General's opinion, (b) by the testimony of the Commissioner and the Superintendent, and (c) by the testimony of twelve security guards who severally testified that, upon objection by each of them to Wiseman on diverse and separate occasions during the filming of sequences involving nudity and obscenity and other situations they deemed improper, Wiseman assured the security guards that they had "nothing to worry about", that the officials of the department had the right to approve and edit the film after it was completed and before it was shown. Wiseman further assured the guards when they objected to patients being photographed in the nude that he, Wiseman, would only show them from the waist up in the final film.

4. At no time prior to the bringing of this suit, during the many conferences between Wiseman and the State officials after the film was completed and was finally shown to the Superintendent and the Commissioner, did Wiseman deny the assertion by each of these officials, made in Wiseman's presence, that he had agreed to their right of approval before the film was to be shown. At no time during the conferences with the Attorney General, and in particular with Assistant Attorney General Frederick E. Greenman

(Greenman), did Wiseman deny that the State officials had the right of approval of the film before it was shown. In several conferences between Wiseman and Greenman after the first showing of the film at Lincoln Center in New York City on September 8, 1967 (see Paragraph 11 for further findings concerning this showing), Wiseman agreed that he would not show the film again until the Attorney General had given his decision as to certain legal questions that arose concerning the showing of the film, and that neither party "would make any comment to the press until such decision was made."

5. Sometime in April, 1966, Wiseman and his film crew, Messrs. Eames and Marshall, started filming at the Institution, and they were given free access to all of the departments at the Institution, excepting The Treatment Center for the Sexually Dangerous (which was made off limits as a result of the strong objections made by Dr. Harry Kozol, director of the Center, in his letter of May 2, 1966 to the Superintendent, Exhibit No. 14). Wiseman and his crew were accompanied by a security guard as they roamed about the Institution making their film. They were there, off and on, for about three months, shooting approximately 80,000 feet of film, taking pictures indiscriminately of mentally incompetent patients and inmates in the nude while these persons were in the most personal and private situations.

6. When Wiseman sought and secured permission to make a film, he represented that the film he was to make would be known as "The Bridgewater Story". It was to be an educational documentary, as set forth in detail in his five-page memorandum (Exhibit No. 1A). The following are the pertinent excerpts from this memorandum:

"This will be a film about the Massachusetts Correctional Institution at Bridgewater. Bridgewater is a prison for (1) the criminally insane, (2) defective delinquents,

(3) alcoholics, (4) narcotics addicts, (5) sexual deviates, (6) juvenile offenders. The prison therefore has a cross-section of the problems confronting the state in dealing with a wide range of behavior of individuals whom the state must (1) Punish, (2) Rehabilitate, (3) Treat, (4) Segregate. The purpose of this film is to give people an awareness and an understanding of these problems and the alternatives available to the state and its citizens.

"The story of the film would be that of *three people*—an inmate most of whose adult life has been spent at Bridgewater; a youthful offender committed from the Roxbury District Court for a 35 day observation period (Judge McKenney, Chief Judge of the Roxbury, Massachusetts, District Court, has granted us permission to photograph the sentencing); and a Correctional Officer intimately concerned with the day to day functioning of the institution. In showing the day to day activities of these *three people* it will be possible to illustrate the various services performed—custodial, punitive, rehabilitative and medical as well as the conflicting and complementary points of view of prisoner, patient, guard, family, legislature, etc.

"This will be a film about a prison and the people who are in it and those that administer it, as well as their families, friends, and the institutions, groups, agencies and forces within the community that either aid or hinder the custody, rehabilitation, punishment and return to community life of those who have been sentenced by the courts to prison." (Emphasis supplied.)

Wiseman further represented (Exhibit No. 12) that the film was to be shown on National Educational Television and would also be available to organizations for teaching and training purposes. The "consultants" on the film would be Charles A. Gaughan, Superintendent of Bridgewater, Professor John Seeley, Chairman of the Department

of Sociology at Brandeis University, Professor Morris Schwartz, Professor of Sociology at Brandeis, and Professor Maurice Stein at Brandeis University.

The plain import of Wiseman's representations was that his film was to be a non-commercial and non-sensational project, to be financed by one of the national charitable foundations. The film would be in the nature of a public service project. Wiseman's representations completely negated any thought of a commercial film to be shown at movie houses throughout the United States, Canada and Europe. Indeed, the State officials could under no circumstances have given permission to make any such commercial film.

7. The film product which Wiseman made, and which the court viewed, constitutes a most flagrant abuse of the privilege he was given to make a film. It contravenes in every essential the stated and avowed purposes made by Wiseman, and as set out in his memorandum to the State officials. The film is no longer entitled "The Bridgewater Story". It is now entitled "Titicut Follies", to be shown to the general public in movie houses throughout the United States and Canada. By no stretch of the imagination can this film be deemed to be the kind of film Wiseman represented he was going to make. Gone is the promise of "The Three People" theme, and in its place there is a new theme—crudities, nudities and obscenities. The film is a nightmare of ghoulish obscenities. It is a crass piece of commercialism—a contrived scenario—designed by its new title and by its contents to titilate the general public and lure them to the box office. The film is 80 minutes of brutal sordidness and human degradation. It is a hodge-podge of sequences, with the camera jumping, helter-skelter, from the showing of an inmate in an act of masturbation to scenes depicting mentally ill patients engaged in repetitive, incoherent and obscene rantings and ravings. The film is excessively pre-

occupied with nudity, with full exposure of the privates of these persons. There is no narrative accompanying the film, nor are there any sub-titles, without which the film is a distortion of the daily routine and conditions at the Institution. Each viewer is left to his own devices as to just what is being portrayed and in what context. Even a professional film critic, who wrote a review of the film, was misled as to what is being portrayed in one of the nude (mob) scenes. Without any explanation it would appear (as it seemed to the critic) that the inmates are indiscriminately and unnecessarily stripped naked, and for no apparent reason. In fact, this scene is a "skin search", which is carried on whenever there is reason to believe that contraband sumggled into the Institution may be secreted on the person of the inmate.

Many of the naked inmates are shown desperately attempting to hide their shame by covering their privates with their hands. The camera, however, is in relentless pursuit—as a hunter stalks his prey—until the stark naked patients can elude the range of the prying eye and ear of the camera. There is a scene of the administering the last rites of the church to a dying patient, the preparation of a corpse for burial, the morgue where shrouded corpses are kept awaiting burial, and a burial scene. A mentally ill patient, grossly deformed by reason of congenital brain damage, is paraded before the camera. We have long since outlawed the exhibition "for hire" of an insane deformed person. See General Laws, Ch. 272, Sec. 33. "It is a film about various forms of madness." There are many other sequences depicting inmates in such a manner which compels the conclusion that the film is a "freak show", and in this connection it is interesting to ponder as to just what Wiseman had in mind when he wrote a letter to one of the film festivals, seeking to have the film shown, in which he volunteered the statement—using these very words—

"... nor is it a freak show". (See Exhibit #51 and #54). No amount of rhetoric, no shibboleths of "free speech" and the "right of the public to know" can obscure or masquerade this pictorial performance for what it really is—a piece of abject commercialism, trafficking on the loneliness, on the human misery, degradation and sordidness in the lives of these unfortunate humans.

None of the consultants previously mentioned was ever consulted, nor had they anything to do with the making of this film. Wiseman never showed the film to National Educational Television nor has he offered to make it available for education or training purposes. It received no financial support from any of the national foundations. It was financed, in part, by private investors, for profit (Exhibit #20). Practically nothing is shown about the other departments at Bridgewater. Wiseman concentrated his camera at the hospital for the criminally insane and, in particular, on those patients who were extremely disturbed and violent.

As bearing upon the question of whether Wiseman produced the kind of film he had promised to make, it may be pertinent to quote from his letter of April 26, 1966 (Exhibit #44), addressed to Russian officials, in his unsuccessful efforts to have the film shown at the Fifth Moscow International Film Festival. Wiseman's letter states in part:

> "The film is organized around an inmate-staff variety show in which the staff and the prisoner/patients exchange roles. For example, the prison psychologist will play the part of a murderer, and a murderer plays the part of a sheriff. Shots of the show are cut together with the "actors" performing their ordinary roles in the prison life—the psychologist as a psychologist, and the murderer as a clerk typist."

Whatever else may be implied in the term "educational documentary", it certainly must mean "fidelity to truth".

Just how such a contrived scenario squares with "fidelity to truth" is most difficult to conceive.

We have seen 3200 feet of film. Wiseman has over 70,000 feet of film he took at Bridgewater, depicting many indecencies, and only he knows what else is portrayed in this footage.

8. Wiseman, without notice to the State officials, caused the Bridgewater Film Co., Inc., to be organized in November 14, 1966 (Exhibit #21). Its officers and directors were David Eames and Mr. and Mrs. Mrs. John Marshall. The latter two resigned on September 25, 1967 when they first learned that the film was going to be shown to the public at Lincoln Center. Their letters of resignation contained strong protests and objections to the public showing of the film and, in particular, to the proposed sale of the distribution rights of the film to the respondent Grove Press, Inc., a New York corporation, (Grove), (Exhibit #42). (The trial of this action against Grove and the respondent Titicut Follies Film Distributing Co., Inc., also a New York corporation, has been postponed on motion of the petitioners for severance.) The court finds that although Wiseman's name does not appear as an officer or director of this corporation,** he is the controlling mind and power in its operations. This corporation is nothing but an empty shell —it has no capital, no stockholders; never adopted any by-laws; never held any meetings (not even the first meeting of the named incorporators). It is merely an instrument created by Wiseman for the plain and manifest purpose of the unlimited commercial exploitation of the film. For the purposes of this case, the court finds no further need to refer to this corporation, except to say that Bridgewater Film Co., Inc., is Wiseman.

9. Wiseman violated each of the conditions to which he had agreed when he received permission to make the film

** Bridgewater Film Co., Inc.

at Bridgewater. He photographed many inmates and patients at the Institution who were, and still are, mentally ill. He failed to obtain a written release from each of the inmates and patients shown in the film who are legally competent to execute such a release. He failed to show the completed film to, and secure approval from, the Commissioner and the Superintendent before releasing it. As soon as the film was completed, and before it was shown to the State officials, and without their knowledge, Wiseman, beginning in April, 1967, solicited practically every "Film Festival" (in 13 cities) in Europe and the United States in his effort to have the film publicly exhibited.* (See Exhibits Nos. 44 to 59, inclusive.)

10. After the Superintendent was first shown the film on June 1, 1967, he objected to the excessive nudity and the "new theme" in the film. He told Wiseman that, because of its content, he felt that the Attorney General should view the film. On June 27, 1967, the Attorney General, accompanied by some members of his staff, and the Superintendent were shown the film by Wiseman. After viewing it, the Attorney General raised several questions—namely: the excessive nudity in the film; the right of privacy of the inmates; the legal competency of those from whom releases were allegedly obtained. He informed Wiseman, among other things, that he was going to have his staff do some

* The following is a list of the cities conducting "Annual Film Festivals" during the year 1967, at which Wiseman sought to make contacts and arrangements for the showing and ultimate commercial release of the film, prior to his deal giving Grove exclusive rights of distribution for the United States and Canada: *Manheim, West Germany; London, England; Venice, Italy; Moscow, Russia; Alcapulco, Mexico; Liepzig, Germany; Budapest, Hungary; Thessalonika, Greece; Cork, Ireland; Edinburgh, Scotland; West Berlin, San Francisco, and New York City.*

He sought maximum saturation exposure of the film to be shown on the screens of movie houses anywhere and everywhere.

legal research on these matters, and Wiseman agreed to do nothing further about showing the film until the Attorney General had given his opinion on these matters.

11. Without notice to the State officials, Wiseman showed the film on Septemebr 8, 1967 to a selection committee of the Lincoln Center Film Festival, and others, in New York City. In connection with this showing, Wiseman, by letter dated August 18, 1967 (Exhibit #58) informed the director of the festival ". . . I have secured releases from . . . people who are in the film or *from their authorized representatives*". This statement was not true, and the reference to ". . . *their authorized representatives*" was made out of whole cloth. (Emphasis supplied.)

12. On September 16, 1967, an article appeared in the Quincy Patriot Ledger (Exhibit #40) in which the Superintendent asserted that he had informed Wiseman that the film could not be shown at the New York Film Festival, scheduled for September 26, 1967, "until it is approved by the state's 'three censors' " (the Commissioner, the Superintendent and the Attorney General). On September 18, 1967, Wiseman called Greenman about the article and asked him if this meant that Wiseman would have "to withdraw" the film, to which Greenman replied by reminding Wiseman of his agreement not to show the film until the Attorney General had given his opinion. Arrangements were then made for the parties to meet at the Attorney General's office on September 20, which meeting was postponed on that date until the next day, September 21, at the request of Wiseman.

13. On September 21, 1967, there was a conference at the Attorney General's office, attended by Wiseman and his legal advisers, attorney G. Berlin and Professor Alan Dershowitz of the Harvard Law School. Wiseman was informed by the Attorney General that in his opinion the film constituted an invasion of the privacy of the inmates shown

in the film; that mentally incompetent patients were shown in the film, and that releases, if any, obtained by Wiseman were not valid in view of the manner in which they were obtained. The Attorney General concluded by saying that he had a draft of a letter to the Commissioner incorporating these conclusions. As of the time of this meeting, the Commissioner had not yet been shown the film. He viewed it for the first time on the evening of September 21, 1967. On September 22, 1967, the Commissioner notified Wiseman by mail that the film could not be shown "in its present form". (Exhibit #7A.)

14. As to the releases allegedly procured by Wiseman from the mentally competent inmates and patients appearing in the film, the court finds and rules that the procedure followed by Wiseman was a sham and a pretense. Wiseman testified that he had procured about 170 individual releases, but none was produced in evidence during the trial (except as to a stipulation concerning ten of them.) The releases were not shown to the Attorney General when he requested to see them. These releases, if they were obtained, were executed before the actual filming of the sequence involving the releasor, who at that time had no idea of what was going to be portrayed, because it was to be "spontaneous and unrehearsed". He was never shown the actual film sequence concerning which his release was sought. Wiseman did not have any prepared list of the names of those whose pictures he had taken, and so it is impossible to tell from viewing the film as to the precise number or identity of the persons appearing therein who had purportedly signed releases. Furthermore, there is indeed a serious question as to whether these patients were free to exercise any meaningful choice when they were asked to sign a release. These persons, being in custody, could well have been under psychological pressure or duress, when requested to sign a release, while in the presence of a security guard who accom-

panied the camera crew. As the consideration for the signing of a release, Wiseman promised to deposit "a few dollars" in the account (at the Institution) of each inmate or patient who signed. Wiseman neglected to keep his promises. The court finds and rules that such releases as may have been obtained are a nullity.

15. Sometime in August 1967, Wiseman, unknown to the State officials, started negotiations which culminated in an agreement in September 1967 with Grove, whereby Grove was given the exclusive rights to distribute the film "in all sizes and gauges of film for all purposes in the United States and Canada". This "memo" of agreement (Exhibit #22) amounted to an unlimited and unrestricted commercial exploitation of the film for its showing to the general public at movie houses throughout the United States and Canada. Under this arrangement, Wiseman is to receive an advance of $25,000. against the payment to him of 50% of the theatrical gross receipts, and 75% from any television sale in the territory. Grove agreed to spend $10,000. in the advertising and promoting of the film, with Grove having "complete control of the manner and means of distribution." The aforesaid arrangement was entered into surreptitiously, without notice to or knowledge of the State officials. In fact, the deal with Grove was being consummated during the very period that Wiseman was having his conferences with the Attorney General's office—supposedly awaiting an opinion as to whether the film was to be approved.

16. On Thursday, September 28, 1967, the film "Titicut Follies" was shown at the Lincoln Center, New York City, before an audience of over two hundred people. Mr. Wiseman was present at the showing and gave a talk about the film after the film concluded. On October 3, 1967, the film commenced its exhibition, for profit, at Cinema 57 Rendezvous, a public theatre in New York City, and was shown five times daily, for two to three weeks. When it completed

its showing at this theatre, it was exhibited for approximately two to three additional weeks at Carnegie Hall Theatre, for profit, with showings at 12:00 noon, 1:30 P.M., 3:00 P.M., 4:45 P.M., 6:30 P.M., 8:15 P.M., and 10:00 P.M. Both theatres advertised it as: "Makes Marat/Sade look like 'Holiday on Ice' ". A charge was made by these theatres to their patrons .

17. The court finds and rules that the film is an unwarranted and illegal intrusion by Wiseman into the lives and right to privacy of each inmate and patient who is pictured there. Many, if not all, of the scenes embarrass and degrade these persons in a manner clearly not warranted by any legitimate public concern. It would seem to be axiomatic that no person, whether mentally competent or not, can be dragooned or indentured into playing the part of an actor in a movie scenario whether as a star or in a supporting role. Assuming a matter of genuine public interest, and further assuming that the officials had authority to grant permission to make an educational documentary film, there is a heavy responsibility on these officials to protect the basic human rights of the patients and inmates who have been committed to their charge. These patients have an absolute right, subject only to the necessary procedures for internal security, and for their care, custody and treatment, to be left alone. A legal pronouncement that, in the name of free speech, a person may be required, without his approval or agreement, to participate in a commercial, money-making movie or any other commercial enterprise would be shocking indeed. The right of the public to know and freedom of speech are not absolutes which, at all events and under all conditions, override the right of privacy. The court rules that the legitimate public interest, freedom of speech, and right of the public to know does not carry with them the unauthorized use of pictures showing persons, clearly identifiable, in such a manner as to outrage and

cause mental suffering, shame or humiliation to a person of ordinary sensibilities. The court finds and rules that in the circumstances of this case these persons were virtually forced into exhibition of their nude bodies, and to suffer other indignities for the plain and manifest purpose of profiitable box office receipts.

18. Those who are confined to state institutions under authority of law are entitled to absolute protection against their commercial exploitation in any way for profit or gain. This truth would seem to be founded upon the most elementary consideration of natural law and human decency, and it is the responsibility of the State to protect them against any such invasion or exploitation. The failure to give the patients such protection would be a most serious dereliction of duty.

19. Wiseman now takes the position that even if he agreed to the conditions, including the right of approval of the film by the State officials before it could be shown, this would constitute a violation of the right of free speech and of the free dissemination of news, and therefore the conditions cannot be enforced. He seizes upon this constitutional provision to permit him to exploit these unfortunate individuals through the medium of the film scenario he had contrived. Apparently this contention is based in part on the premise that these inmates, by virtue of their confinement, are bereft of any vestige of personal privacy and human dignity. He says, in substance, that they are now public property and can be displayed as such in a commercial movie.

20. The court finds and rules that the terms and conditions upon which Wiseman was given permission to make the film, including the right of approval, to which Wiseman fully agreed, do not constitute "censorship" in any pejorative sense. In the context of the problems necessarily involved in the making and subsequent showing of the film,

these terms and conditions were necessary precautions and safeguards in order that the State protect the civil and privacy rights of the patients and inmates.

21. At no time during the period of almost two years since Wiseman was first given permission to make a film at Bridgewater and, in particular, after the film was viewed by the State officials and during any of the conferences with State officials, did Wiseman or his attorney or his other legal advisers raise any question concerning "censorship" by the State or the violation of the rights of free speech, etc. This issue is a complete afterthought, and was first rasied by Wiseman when the Commonwealth instituted this suit. Wiseman seeks thereby to divert attention (a) from his wilful violation of the express agreements he made in connection with the permission given him to make the film, and (b) from his crass commercialization and venality, which are all so painfully obvious from the kind of film he made and exhibited, and from the sale of its distribution rights for unrestricted and public showing at movie houses throughout the United States and Canada. It is all too clear that Wiseman is now attempting to cast the Commonwealth of Massachusetts in the role of a malefactor seeking to suppress matters of legitimate concern; and to picture the State as trying to hide from public view and knowledge alleged unsatisfactory conditions at one of its institutions.

22. The court rules that the film is a violation of the natural and civil rights of the patients and inmates at the Institution, and in particular it is a violation of their respective rights of privacy. This right of privacy rests upon the most elementary principles of natural law, and its violation constitutes a trespass and a nuisance. Continued or continuing violations are a proper subject for injunctive relief. The true rule is that equity will protect the personal and intangible rights of an individual just as it will enjoin the violation of a person's property rights.

23. As to the status of the respective petitioners, the court finds and rules as follows:

(1) The Commissioner and the Superintendent, as individuals or as officials of the State, have no standing as petitioners. There is no allegation or any proof that the right of privacy as to either of them has been violated. On the issue of Wiseman's failure to observe and comply with the terms and conditions imposed on him when he was given the privilege to make the movie, the Commonwealth of Massachusetts is the proper party petitioner and not these two public officials who were then and there acting in the presumptive performance of their respective duties in behalf of the Commonwealth.

(2) Mr. Gaughan (Superintendent), as guardian of Mr. Bulcock, is a proper party petitioner in the trial of the issue of the invasion of the right of privacy of his ward, Mr. Bulcock. Mr. Gaughan's appointment as guardian cannot be collaterally attacked in these proceedings.

(3) The Commonwealth of Massachusetts has standing, in its sovereign capacity, to bring this bill of complaint, seeking an injunction based on the violation of the terms and conditions of the privilege given Wiseman to make a movie of the patients, inmates, and others committed to its care and custody at Bridgewater. This position may appear to rest upon the narrow ground of the breach of an "agreement", wherein equitable relief may be sought and obtained if the breach involves a continuing trespass or irreparable injury or damage. There is a further and much broader ground which gives the Commonwealth status as a party in these proceedings—namely: the obligation of the State to protect the right of privacy of those who are committed to its care and custody, and especially the mentally ill. While the right of privacy is generally considered to be personal, never-

theless, on the facts in this case, the Commonwealth may properly seek injunctive relief in their behalf. The Commonwealth not only has the power to protect the right of privacy of these patients and inmates, it has a bounden duty to do so.

24. In this proceeding, the petitioners do not seek any award of compensatory damages, as such, arising out of the violation by Wiseman of the right of privacy of the inmates and patients. With respect to the petitioners' prayers for relief concerning the disposition of the income and profits which have been derived from the showing of the film, the court reserves judgment thereon until the conclusion of this suit against the respondents Grove Press, Inc. and Titicut Follies Film Distributing Co., Inc.

25. Let a decree be entered substantially in accordance with paragraphs numbered 4, 5, 6, 11 and 12 and 13 of the prayers as set out in the substitute bill of complaint, modified, however, by the deletion of the words "without prior approval in writing by the plaintiffs", as appearing at the end of said paragraphs numbered 5 and 12, respectively. The respondents Frederick Wiseman and Bridgewater Film Co., Inc. are further ordered to deliver to the Commonwealth forthwith, upon the entry of the decree, the balance of the film footage (the original negative and any and all prints thereof), together with sound tapes, taken by them at Bridgewater.

HARRY KALUS
Justice of the Superior Court

Entered: January 4, 1968

# APPENDIX C

## Judgment of the Supreme Judicial Court of Massachusetts

COMMONWEALTH OF MASSACHUSETTS.

SUPREME JUDICIAL COURT FOR THE COMMONWEALTH,

AT BOSTON, June 24, 1969.

IN THE CASE OF

COMMONWEALTH and others

*vs.*

FREDERICK WISEMAN and others

pending in the Superior Court for the County of Suffolk.

ORDERED, that the following entry be made in the docket; viz.,—

The interlocutory decree with respect to the demurrer is affirmed. The final decree is reversed in order to permit its modification. A modified decree, consistent with this opinion, is to be entered. The Commonwealth is to have costs of appeal.

BY THE COURT,

RICHARD A. McLAUGHLIN, CLERK.

June 24, 1969

# APPENDIX D

## Final Decree After Rescript

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPERIOR COURT

EQ. No. 87538

COMMONWEALTH OF MASSACHUSETTS ET AL

*vs.*

FREDERICK WISEMAN ET AL

*FINAL DECREE AFTER RESCRIPT*

This case came on to be further heard after rescript from the Supreme Judicial Court dated June 24, 1969, and after hearing arguments of counsel for the petitioners and for the respondents Wiseman and Bridgewater Film Company, Inc., upon consideration thereof, it is hereby ordered, adjudged and decreed that:

1. The respondents Frederick Wiseman, Bridgewater Film Company, Inc., Grove Press, Inc., and Titicut Follies Distributing Co., Inc., and each of them, and their agents, servants and employees, and the officers of each corporate respondent, are permanently enjoined from exhibiting, showing, causing to be shown or authorizing to be shown the film "Titicut Follies" to any audience, group, person or persons, except as permitted in paragraph 2 hereof; and from entering into or carrying out any contracts or agreements which would permit the exhibition or showing of said film, except as permitted in paragraph 2 hereof; and from assigning, selling or transferring said film to any other person.

2. Showings of the film "Titicut Follies" to legislators, judges, lawyers, sociologists, social workers, doctors, psychiatrists, students in these or related fields, and organizations dealing with the social problems of custodial care and mental infirmity, are hereby permitted; provided, however, that at any such showing a brief explanation shall be included in the film that changes and improvemnets have

taken place at Massachusetts Correctional Institution Bridgewater since 1966 and provided further that one week prior to any prospective showing to persons within the aforementioned categories a statement shall be filed with the Clerk of this Court signed by the respondent Wiseman or an authorized person claiming through him, such as the respondents Grove Press, Inc. and Titicut Follies Film Distributing Co., Inc., naming the place and time of the showing and the nature of the audience to which it is to be shown and the name and address of the individual furnishing the information, and within one week after the showing a statement shall be filed with the Clerk of this Court signed by the respondent Wiseman, or an authorized person claiming through him, such as the respondents Grove Press, Inc. and Titicut Follies Film Distributing Co., Inc., stating on personal knowledge the nature of the audience to which the film was actually shown at such showing and giving the name and address of the individual furnishing the information, and provided still further that a copy of each such statement is to be mailed at the time of filing to the Attorney General of the Commonwealth by the respondent causing the showing.

3. The respondent Wiseman is enjoined from assigning, selling, transferring, or otherwise disposing of the original negative and all prints, together with sound tapes, taken by the respondent Wiseman at Massachusetts Correctional Institution, Bridgewater, and not incorporated in the film "Titicut Follies" and from making any use of such material without the prior approval of the Superior Court.

4. The Substitute Bill in Equity is dismissed as to petitioner Gavin and to petitioner Gaughan as he is Superintendent of M.C.I. Bridgewater, and, except as to the relief granted in paragraphs 1, 2 and 3 hereof, is otherwise dismissed, without prejudice, however, to the right of the petitioner Bulcock to maintain an action at law for damages.

5. The Court retains jurisdiction of the case for the granting of such supplemental relief as from time to time may be appropriate under this decree.

6. The respondents Frederick Wiseman and Bridgewater Film Company, Inc. shall pay to the Commonwealth costs of suit taxed at $957.20 and costs of appeal $2,573.44, a total of $3,530.64, and the respondents Grove Press, Inc. and Titicut Follies Film Distributing Co., Inc. shall pay to the Commonwealth costs of suit taxed at $260.80, execution to issue accordingly.

By the Court, (Kalus, J.)
FRANCIS P. CONCANNON,
Assistant Clerk.

Entered: July 9, 1969

# APPENDIX E

## Opinion in Cullen v. Grove Press, Inc. 276 F. Supp. 727 (S.D.N.Y. 1967)

CHARLES J. CULLEN, GEORGE L. PARENT, CARLTON G. SHAW, AND EDWIN F. SPENCER,
PLAINTIFFS,
*v.*
GROVE PRESS, INC., TITICUT FOLLIES DISTRIBUTION CO., INC. AND F. AND A. THEATRES, INC.,
DEFENDANTS.
UNITED STATES DISTRICT COURT
S. D. NEW YORK.
Nov. 30, 1967.

MANSFIELD, District Judge.

In this diversity action for defamation and invasion of privacy, plaintiffs, four Correction Officers at Massachusetts Correctional Institution, South Bridgewater, Mass. (hereinafter "Bridgewater"), seek a preliminary injunction to prevent the distribution and exhibition by defendants of a motion picture entitled "Titicut Follies" on the ground that the film violates plaintiffs' right of privacy under New York Civil Rights Law, McKinney's Consol. Laws, c. 6, § 51. The facts, as they appear from the moving and opposing papers and affidavits, are as follows:

For a period of about eight weeks in the spring and summer of 1966, Frederick Wiseman and at least two technical assistants were permitted[1] to enter Bridgewater daily, under the supervision and control of a senior Correction Officer, for the purpose of photographing and producing a real-life film documenting the care and treatment of inmates, particularly those incarcerated at the State Hos-

[1] Indeed, Wiseman and his staff could hardly have spent approximately eight weeks on the premises shooting film without such permission and cooperation.

pital Division for the criminally insane, where plantiffs were employed by the Commonwealth of Massachusetts as Correction Officers. The film was made with portable sound and camera equipment usually located within a few feet of the inmates and guards as they went about their daily routine. The filmmaking equipment was not hidden and no scenes were staged. Plaintiffs were instructed by their superiors to carry out their duties as usual, and from time to time were subject to the directions of Wiseman for the purpose of making the film. Photographs of plaintiffs appear during the course of the film, particularly in a scene in which they are shown conducting a "skin search" of naked inmates.

Since the more than 80,000 feet of film shot at Bridgewater during the eight-week period far exceeded the normal playing period for a documentary film, Wiseman and his staff cut and edited it to a final product, about 3,200 feet long and requiring 84 minutes running time, which was entitled "Titicut Follies."[2] The film was then allegedly assigned to defendant Grove Press, Inc., and distributed and exhibited through its subsidiary, defendant Titicut Follies Film Distributing Co., Inc. For a time it was exhibited at a commercial theatre owned by defendant F. & A. Theatres, Inc., which has not been served with the Order to Show Cause bringing on this motion for preliminary injunction.

Defendants argue that even if plaintiffs are able to make out a case under the New York right of privacy statute, the exhibition and distribution of the film is protected by the First Amendmnet of the United States Constitution,

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[2] The title "Titicut Follies" represents the name of an annual variety show put on jointly by the inmates and employees of Bridgewater, the term "Titicut" being the Indian name for the area immediately surrounding Bridgewater. The title is not derived from the words "titillate" or "titillation".

as recently interpreted by the Supreme Court in *Time, Inc.* v. *Hill,* 385 U.S. 374, S. Ct. 534, 17 L.Ed.2d 456 (1967), where the Court said:

> "We hold that the constitutional protections for speech and press preclude the application of the New York [right of privacy] statute to redress false reports of matters of public interest in the absence of proof that the defendant published the report with knowledge of its falsity or in reckless disregard of the truth." (385 U.S. at 387-388, 87 S.Ct. at 542)

The conditions in public institutions such as Bridgewater for the care of the criminally insane, including the physical facilities, conduct of employees, and type of treatment administered to inmates, are matters which are of great interest to the public generally. Such public interest is both legitimate and healthy. Quite aside from the fact that substantial sums of taxpayers' money are spent annually on such institutions, there is the necessity for keeping the public informed as a means of developing responsible suggestions for improvement and of avoiding abuse of inmates who for the most part are unable intelligently to voice any effective suggestions or protests. Distasteful as the subject matter may often be, it represents an ever-increasing phenomenon in our society that cannot be swept under the rug. Defendants have submitted an imposing array of affidavits from experts in psychiatry, law, sociology, and other fields concerned with the care of the mentally ill, attesting to the importance of the film in contributing to public and professional understanding of current conditions in mental institutions, and have also submitted reviews by critics acclaiming the film's artistic merit.

In view of the legitimate public interest in such matters and because "expression by means of motion pictures is included within the free speech and free press guaranty

of the "First and Fourteenth Amendments", *Joseph Burstyn, Inc.* v. *Wilson,* 343 U.S. 495, 502, 72 S.Ct. 777, 781, 96 L.Ed. 1098 (1952), and see *Freedman* v. *State of Maryland,* 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965), plaintiffs' motion must be denied unless "Titicut Follies" is a false report of conditions at Bridgewater, made with knowledge of its falsity or in reckless disregard of the truth, *Time, Inc.* v. *Hill,* supra, see American Law Institute Restatement of the Law of Torts, 2nd. Tentative Draft No. 13, Apr. 27, 1967, § 652 F. pp. 127-38.

Plaintiffs' complaint and moving papers fail to anticipate or meet the teachings of *Time, Inc.* v. *Hill,* supra, being content merely to allege invasion of privacy and defamation. The complaint alleges that Wiseman and his associates assured plaintiffs that the filming of "skin searches" of inmates would reveal only the inmates, upper extremities and that the film would be used and displayed only for the purpose of education in connection with the care of the criminally insane; and that the film was thereafter promoted for exhibition in New York City through inflamatory advertising depicting scenes in which plaintiffs are photographically visible to the viewer and in which some inmates are characterized as "naked inmates", "inmates taunted into hysteria by their guards until they explode in frenzied wrath" and as "indistinguishable from the guards". On the pertinent issues the moving papers offer no additional facts other than the general statement that the film "has been edited by the said Wiseman and his associates and distributed by the defendants in such manner as to emphasize certain erotic aspects of nudity and overtones and suggestions of indifference and brutality on the part of the Correction Officers as a class of which your plaintiffs are members."

Faced with the Supreme Court's decision in *Time, Inc.* v. *Hill,* plaintiffs on oral argument and in a reply memo-

randum contend in effect that this display of inmates' nudity in the film was unnecessary to any public interest involved, and that the film does not give a true and balanced impression of conditions at Bridgewater but distorts conditions thereby emphasizing the bizarre and failing to show other aspects that would explain the scenes that are portrayed and thus put them in proper context.

The fact that the film, though documentary in nature, has been exhibited to the general public for an admission price at a commercial theatre, and that much of the original 80,000 feet was not used in the final documentary, is of little weight on the issue before this Court, which is whether the documentary, as edited, gives a deliberately or recklessly false account of conditions at Bridgewater.

The producer and director of the film, a law school graduate and former teacher of criminal law, psychiatry and legal medicine, has engaged in various research projects involving social science material and the law, including a study (pursuant to a grant from the National Institute of Health) of the relationship between crime and mental illness, and a report for the National Crime Commission dealing with social problems. He asserts under oath that the purpose of "Titicut Follies" was to give the general public a true and objective picture of typical conditions existing in many state institutions for the criminally insane, as reflected at Bridgewater, one of the oldest of such institutions; and that the film fairly and accurately depicts such conditions without any attempt to editorialize, to place undue emphasis on nudity or sex, or to distort the activities of medical personnel, social workers or correctional employees.

The Court viewed the film with the consent of all parties. While it is undoubtedly true that a motion picture camera, used under skillful direction, is capable of substantial distortion, and that this Court could never be absolutely cer-

tain whether the film accurately portrays the conditions at Bridgewater (at least without personal observation that might require weeks), I am satisfied that the picture does not knowingly or recklessly falsify or misrepresent such conditions or the conduct of the plaintiffs. By its very nature the subject matter is such that a chronicle of it must to some extent be gruesome and depressing in character, and in this case the picture fulfills such anticipation. The loudly vocal antics, haunting stares and grim behavior of many inmates, are photographed against the starkly depressing background of a bare, prison-type hospital. The film shows detailed closeups of such episodes as the forced nose-feeding of an inmate on a hunger strike and his later death and burial; the explosive reaction of an inmate to repeated taunting by Correction Officers about his failure to keep his cell clean; the degrading process of subjecting inmates to stripping of their clothes publicy for a "skin search" conducted by Correction Officers for the purpose of discovering contraband; the questioning by a staff psychiatrist of a young paranoid husband and father committed for sex attacks on children; and the unhappy protests of a young, articulate schizophrenic to the effect that after one and a half years as an inmate he is being driven insane by the surroundings and by the poor treatment or lack of treatment by the staff.

The foregoing scenes may well create an impression of hopelessness and inadequacy, an insensitivity on the part of both Correction Officers and staff doctors toward inmates under their care, a failure to accord to the inmates the minimum dignity due to human beings, and an atmosphere of stygian purgatory where they are relegated to the slow process of waiting for death. Plaintiffs, however, have offered no proof that the filmed events and activities are false or distorted. On the contrary the producer contends that these scenes are typical and in support of his conten-

tion has offered to exhibit to the Court the balance of the 80,000 feet of film. In view of the absence of any evidence to the contrary, the Court does not find any falsity or substantial distortion, knowing or reckless, in "Titicut Follies" as edited. Assuming the substantial accuracy of the film, it deals with a subject of legitimate public interest and indicates a lack of sufficient competent personnel and funds to meet some of the problems portrayed.

There remains the question of whether plaintiffs are entitled to relief on the ground that the film is obscene, thereby precluding the defendants from invoking the First Amendment, a contention of doubtful merit that is at best hinted at in plaintiffs' reply. While it is true that in a few scenes, which represent a relatively small portion of the film, inmates are disclosed in a completely nude state, with their private parts exposed, the nudity appears in each instance to form an integral part of an episode that is of legitimate public interest, such as the process of conducting public "skin searches" of the inmates, or the living conditions in the inmates' cells where they are kept without clothes, or the like. There are no commentaries or actions that could be construed as an appeal to any prurient interest in sex, and this Court does not believe that the material is so patently offensive as to affront community standards. See A Book Named *"John Cleland's Memoirs of a Woman of Pleasure"* v. *Atty. Gen. of Com. of Massachusetts*, 383 U.S. 413, 86 S.Ct. 975, 16 L.Ed.2d 1 (1966). In short, the dominant theme is hardly one appealing to a prurient interest in sex. Furthermore the film, viewed as a whole, is of educational, not entertainment, interest. It therefore becomes unnecessary to consider whether the plaintiffs, public employees who are not depicted in the nude and who consented to their being filmed in such scenes with knowledge that they would be exhibited to others, have

any standing to seek relief based upon the nudity of the inmates.

Plaintiffs' further contention that their participation in the filmed scenes with naked inmates was subject to an understanding that only the "upper extremities" of the inmates would be photographed and that the film would be exhibited only for "educational purposes", such as on educational telveision, and not at commercial theatres, is sharply disputed by defendants and, even if true, would not provide a basis for relief, provided the film is within the protection of the First Amendment. No proof was offered by the plaintiffs in support of their allegation of "inflammatory advertising".

On the basis of the moving and opposing papers and affidavits, and after viewing the film itself, the Court concludes that the film is not a false report made with knowledge of its falsity or in reckless disregard of the truth, that it is not obscene and that it is therefore protected by the First Amendment. This conclusion does not, of course, constitute an adjudication of rights of non-parties, such as individual inmates claiming violation of their own personal rights or state officials suing for breach of contract, if any, with respect to conditions for exhibition of the film.

The motion for preliminary injunction is denied. The foregoing shall constitute the Court's findings of fact and conclusions of law pursuant to Rule 65, F.R.Civ.P.

So ordered.

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# In The Supreme Court of the United States

OCTOBER TERM, 1969

No. 621

FREDERICK WISEMAN, et al.,
*Petitioners*

v.

COMMONWEALTH OF MASSACHUSETTS, et al.,
*Respondents*

## BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS

The respondents respectfully pray that the petition of Frederick Wiseman and Bridgewater Film Company, Inc., for a writ of certiorari to the Supreme Judicial Court for the Commonwealth of Massachusetts in the case of *Commonwealth* v. *Wiseman* be denied.

## OPINIONS BELOW

The opinion of the Supreme Judicial Court for the Commonwealth of Massachusetts (which is set out in Appendix A to the Petition) is reported in Mass. Adv. Sh. (1969) 1055 and in 249 N.E.2d 610 (1969). It has not yet been reported in the official Massachusetts Reports.

The opinion of the Superior Court for Suffolk County (Massachusetts) (which is set out in Appendix B to the Petition) is not reported in any official or unofficial reporter.

## STATEMENT OF THE CASE

### Prior Proceedings

The respondents[1] brought a suit in equity in the Superior Court for Suffolk County (Massachusetts) against the petitioners and others to enjoin further showings of a film made by the petitioner Frederick Wiseman ("Wiseman") at Massachusetts Correctional Institution, Bridgewater ("Bridgewater"), on the grounds that Wiseman had breached the terms of his agreement with state officials allowing the film to be made and that the showing of the film violated the rights to privacy of inmates portrayed in it. (R.1-19) After trial, the court made extensive findings of fact and rulings of law (R.43-58) holding basically for the respondents and, *inter alia,* enjoined all further showings of the film (R.60-61). Thereafter the petitioners appealed to the Massachusetts Supreme Judicial Court which affirmed the findings of fact and rulings of law of the Superior Court, but modified the relief granted because it was too sweeping in scope. *Commonwealth* v. *Wiseman,* Mass. Adv. Sh. (1969) 1055, 249 N.E.2d 610.

### Statement of Facts[2]

In 1965 Wiseman requested of John A. Gavin, Massachusetts Commissioner of Correction, and Charles W. Gaughan, Superintendent of Bridgewater, permission to make an educational documentary film about Bridgewater. (A-31 n.1, 32; B-45) His request was initially denied. (A-32; B-45) Thereafter his request was reconsidered and on January 28,

[1] The parties are referred to herein by their designations in this Court. The various petitioners and respondents are distinguished only in so far as is relevant to the issues here considered.

[2] After eighteen days of trial, the Superior Court made extensive findings of fact and rulings of law. (R.43-58) Thereafter, on appeal to the Massachusetts Supreme Judicial Court, the petitioners attacked various findings of fact of the trial court. See *Commonwealth* v. *Wiseman,* Mass. Adv. Sh. (1969) 1055, 249 N.E.2d 610, BRIEF FOR THE RESPONDENTS FREDERICK WISEMAN AND BRIDGEWATER FILM COMPANY, INC., pp. 28-36. The respondents devoted a substantial portion of their brief

1966, permission was granted subject to receipt of an Opinion of the Massachusetts Attorney General that the officials could legally permit such filming, and subject to each of the following conditions to which Wiseman agreed:

(a) "that the rights of inmates and patients at Bridgewater [be] fully protected";

(b) that Wiseman use only "photographs of inmates and patients who are legally competent to sign releases";

(c) that Wiseman "obtain a written release from each patient whose photograph is used in the film"; and

(d) that the film not be exhibited without first being viewed and approved by the Commissioner and the Superintendent (A-32; B-45-46).

On March 21, 1966, Hon. Edward Brooke, the then Attorney General for the Commonwealth, gave an opinion to the Commissioner that he could permit such a film to be made if the Superintendent consented. (A-32; B-46; see also 1965-66 Op. Mass. Atty. Gen. 290) From the representations made by Wiseman in seeking permission to make the film the officials of the Commonwealth reasonably concluded that the film was to be a "non-commercial and non-sensational" project. (A-33; B-49)

Permission to commence filming was thereafter granted (A-32; B-46) and Wiseman and his film crew shot eighty thousand feet of film over a three month period beginning

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to showing that these findings were supported by the evidence in every material particular. *Id.*, BRIEF FOR THE PETITIONERS AS APPELLEES, pp. 10-31. The Supreme Judicial Court has upheld these findings. See *Commonwealth* v. *Wiseman*, Mass. Adv. Sh. (1969) 1055, 1056-59, 1060-61, 249 N.E.2d 610, 612-14, 615. Nevertheless the petitioners have stated not the facts as found by the Massachusetts courts, but "facts" for which they purport to find support in the transcript of evidence (145 of the 158 citations in the Statement of Facts in the Petition are to the transcript). It is therefore necessary to state the facts of the case here. Hereinafter references to the decisions of the Massachusetts courts will be to the Petition, Appendix A (Opinion of the Massachusetts Supreme Judicial Court) and Appendix B (Findings, Rulings and Order for Decree of the Suffolk County Superior Court). References are by letter designating the appendix and page number of the Petition, *e.g.* "A-41", "B-52".

in April, 1966 (A-32; B-47). The film crew took pictures of mentally incompetent patients who were in the nude and in most personal and private situations. (A-32-33; B-47) Of sixty-two inmates filmed at this time who are identifiable in the completed film some were incompetent to understand a release (A-37; B-53) and releases were obtained from only eleven or twelve (A-37; B-53).

After editing, the film was shown to the Superintendent for the first time on June 1, 1967, and he objected, among other things, to the excessive nudity. (A-33; B-53) Hon. Elliot Richardson, the then Attorney General for the Commonwealth, viewed the film later that month and raised several questions in regard to whether it could legally be shown to the public. (A-33; B-53-54) At a conference on September 21, 1967, Attorney General Richardson informed Wiseman and his legal advisers that in his opinion the film could not be shown in its present form because it was an invasion of the privacy of inmates shown, mentally incompetent inmates were shown, and any releases obtained by Wiseman were invalid. (A-33; B-54-55) The Commissioner viewed the film for the first time that evening and informed Wiseman the next day that the film could not be shown "in its present form". (A-33-34; B-55) In September, 1967, Wiseman arranged with Grove Press, Inc. for commercial distribution of the film and the film was shown to the general public in commercial motion picture theaters in New York City in the autumn of 1967.[3] (A-34; B-56-57)

Both the Massachusetts Supreme Judicial Court and the Suffolk County Superior Court concluded that further

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[3] The film was also shown to the general public at "The Cinema Village" in New York City after this case was argued before the Massachusetts Supreme Judicial Court. See, *e.g.*, NEW YORK TIMES, June 18, 1969, at 33; *id.*, July 14, 1969, at 32. The advertisement in the June 18 edition of the *New York Times* read: "NOW IT CAN BE SEEN! *1st SHOWING IN 2 YEARS* The EXTENDED AMERICAN PREMIER of TITICUT FOLLIES 'Makes Marat/Sade look like Holiday on Ice.'—N.Y. TIMES."

showings of the film should be enjoined on two independent grounds:[4]

(1) that the film constituted an unwarranted invasion of the privacy of inmates shown and no legitimate public interest in the inmates themselves (as opposed to the institution) warranted the publication of identifiable pictures of the inmates filmed (A-37-42; B-57-58, 59); and

(2) that Wiseman had violated each[5] of the conditions to which he had agreed when he was granted permission to make the film and these conditions were imposed by the Commissioner and the Superintendent as a reasonable means of performing their duty to protect inmates under the control of the Commonwealth from invasion of their rights by Wiseman (A-36-37, 39, 41; B-52-53, 58-59).

The respondents respectfully submit that the petitioners' prayer a writ of certiorari to the Supreme Judicial Court of Massachusetts to review these rulings should be denied.

## REASONS FOR DENYING THE WRIT

### I. The First Issue in the Petition Is Stated Without Reference to the Terms and Circumstances of the Case in Violation of Rule 23(c) of This Court and Presents No Case or Controversy over Which This Court Has Jurisdiction.

Rule 23(c) of this Court requires that the questions presented for review be "expressed in the terms and cir-

[4] The Supreme Judicial Court modified the decree of the Superior Court to permit showings to "legislators, judges, lawyers, sociologists, social workers, doctors, psychiatrists, students in these or related fields, and organizations dealing with the social problems of custodial care and mental infirmity." (A-42, 43)

[5] The Massachusetts Supreme Judicial Court found it unnecessary to rely on Wiseman's violation of the fourth condition requiring approval by the Commissioner and the Superintendent (A-36); but it did uphold the findings of the Superior Court that such a condition had been agreed to (A-32) and that it was violated (A-33-34).

cumstances of the case". The first issue as stated by the petitioners clearly violates this rule. It contains no reference whatever to the grounds on which the showing of the film was enjoined by the Massachusetts courts — invasion of privacy and breach of contract — nor are these grounds referred to anywhere in the argument on Point I. In fact, the argument consists primarily of a misrepresentation of the grounds of decision in the Massachusetts courts as being the protection of the public from exposure to the film rather than the protection of the inmate "actors" from exposure to the public. See PETITION, pp. 15-19. For example, the petitioners allege that the court enjoined showing to members of the general public because they "might view the film and be unable to comprehend its message". PETITION, p. 17. In fact the court held that the showing of the film would violate the rights of inmates shown and breach the terms of the permission granted to make it, but that the possible benefits from showings to the specialized and professional audiences enumerated in note 4 (*supra* at 5) outweighed whatever harm such showings might do the inmates.

The deficiency in the statement and argument of petitioners' first issue goes beyond mere violation of a technical rule. By omitting reference to the facts of the case and misrepresenting the opinion of the Massachusetts Supreme Judicial Court, the petitioners drift into purely abstract questions of constitutional law which have no connection with the case at bar. Such questions fail to present this Court with a case or controversy and are therefore not within its jurisdiction. See U.S. CONST. art. 3, §2, cl. 1.

## II. THE PRINCIPLE OF UNCONSTITUTIONAL CONDITIONS IS NOT NOVEL AND IT WAS APPLIED BY THE MASSACHUSETTS SUPREME JUDICIAL COURT CONSISTENTLY WITH THE DECISIONS OF THIS COURT.

There is nothing novel about the principle of "unconstitutional conditions". It was recognized by this Court as

early as 1926 in *Frost & Frost Trucking Co.* v. *Railroad Commission of California,* 271 U.S. 583, 593-94 (1926). The fact that this Court has not yet had occasion to apply it to the making of a film in a state correctional institution does not mean that this case presents "a federal question of substance not [heretofore] determined by this court". SUP. CT. RULE 19(1)(a). Only the fact situation in this case is novel; the applicable principle is well-established.

Although the Massachusetts Supreme Judicial Court did not in its opinion discuss the decisions of this Court involving unconstitutional conditions, it is clear from its citation to "note, 73 HARV. L. REV. 1595" (A-41) that it considered those decisions. The Harvard Law Review note contains a discussion of the cases involving unconstitutional conditions and an analysis of their rationale and application.

It is also clear that the Massachusetts Supreme Judicial Court applied the principle consistently with the most recent decisions of this Court. See *Tinker* v. *Des Moines Independent Community School Dist.,* 393 U.S. 503, 512-13 (1969), citing with apparent approval *Burnside* v. *Byars,* 363 F.2d 744 (5th Cir. 1966), and *Blackwell* v. *Issaquena County Board of Education,* 363 F.2d 749 (5th Cir. 1966); *Pickering* v. *Board of Education,* 391 U.S. 563, 568 (1968). These decisions recognize that a state may impose on teachers and students regulations reasonably designed to protect the interests of the state in maintaining in its schools an orderly atmosphere conducive to education. The Massachusetts Supreme Judicial Court recognized that similar considerations apply to state correctional institutions which are not ordinarily open to the general public. See *Adderley* v. *Florida,* 385 U.S. 39, 41, 47-48 (1966).

The reasoning of the court in regard to the conditions imposed in this case (A-38-41) was as follows: The Commonwealth of Massachusetts has a duty, which its legislature has recognized by statute, to care for and protect

inmates of its correctional institutions who are under its control and therefore unable to protect themselves.[6] The performance of this duty is entrusted to the Massachusetts Commissioner of Correction and, in the case of Bridgewater, to the Superintendent of that institution. The action of those officials in conditioning permission to make a film at Bridgewater on obtaining written releases from inmates filmed and using films only of inmates competent to sign releases was a reasonable means of performing that duty and protecting the inmates from exploitation at the hands of a filmmaker such as Wiseman.[7] These conditions are therefore valid and the only feasible means of enforcing them is by properly limited injunctive relief. This reasoning is fully "in accord with applicable decisions of this court". SUP. CT. RULE 19(1)(a).

## III. THE DECISION OF THE MASSACHUSETTS SUPREME JUDICIAL COURT IS IN ACCORD WITH THE DECISION OF THIS COURT IN *Time, Inc.* v. *Hill.*

The Massachusetts Supreme Judicial Court properly distinguished *Time, Inc.* v. *Hill,* 385 U.S. 374 (1967), and *Julian Messner, Inc.* v. *Spahn,* 387 U.S. 239 (1967), *vacating and remanding* 18 N.Y.2d 324, 221 N.E.2d 543 (1966). Each of those decisions involved the type of invasion of privacy known as publicity placing a person in a false light. See RESTATEMENT (SECOND) OF TORTS §652E (Tent. Draft No. 13, 1967). Since the interest of the individual protected by

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[6] The court held that such a duty existed as a matter of state law and therefore found it unnecessary to consider whether the fourteenth amendment also imposes such a duty on the states as argued by the Civil Liberties Union of Massachusetts. See *Commonwealth* v. *Wiseman,* Mass. Adv. Sh. (1969) 1055, 249 N.E.2d 610, BRIEF OF CIVIL LIBERTIES UNION OF MASSACHUSETTS, AMICUS CURIAE, pp. 6-8.

[7] The court found it unnecessary to consider the condition requiring the approval of the Commissioner and the Superintendent prior to showing the completed film; but this condition was a reasonable means of securing compliance with the other conditions and thereby protecting the rights of the inmates (see Tr. 5-61 to 5-63).

this branch of the law of privacy is quite similar to that protected by the law of defamation, this Court in *Time, Inc.* v. *Hill* applied to it the test of knowledge of the falsity of the publication or reckless disregard for its truth or falsity which was established as to defamation by *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964). See *Time, Inc.* v. *Hill*, 385 U.S. 374, 380-91 (1967).

The case at bar, on the other hand, involves the type of invasion of privacy known as publicity given to private life. See RESTATEMENT (SECOND) OF TORTS §652D (Tent. Draft No. 13, 1967). The interest protected by this branch of the law of privacy is the sensibility of every person to the embarrassment of the publication of the most private and intimate details of his life. Effective public debate does not require the publication of such details. See Nimmer, *The Right To Speak from* Times *to* Time*: First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 CALIF. L. REV. 935, 962 (1968). Furthermore, the injury from such publication, unlike the injury from false publications, is not one which can be cured by more speech. *Id.* at 961. This Court recognized in *Time, Inc.* v. *Hill*, 385 U.S. 374, 383 n.7 (1967), that these distinctions between the two branches of the law of privacy were sufficiently significant to distinguish them constitutionally. The decision of the Massachusetts Supreme Judicial Court making such a distinction was therefore "in accord with applicable decisions of this court".[8] SUP. CT. RULE 19(1)(a).

The Massachusetts Supreme Judicial Court further distinguished *Time* on the ground that the inmates were not

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[8] There is, of course, no inconsistency between the decision of the Massachusetts Supreme Judicial Court and that of the District Court for the Southern District of New York in *Cullen* v. *Grove Press, Inc.*, 276 F. Supp. 727 (S.D.N.Y. 1967). As the court below recognized (A-42), the *Cullen* case involved only correction officers at Bridgewater who were depicted in the film quite differently from the inmates whose interests the Commonwealth represents in this case.

public figures within the *Time* rule. (A-40-41) In *Time* the public interest was in the experiences of the Hill family with three escaped convicts who held them captive in their own home. These experiences were the subject of the *Life Magazine* article involved. In this case the interest is in Bridgewater as an institution and not in any of the individual inmates confined there. This public interest would protect publications about the institution, but it does not make every inmate a public figure so as to protect the publication of recognizable pictures of him. The Massachusetts Supreme Judicial Court held that publication of such pictures was not an essential part of free debate about conditions at the institution. This distinction is also "in accord with applicable decisions of this court". SUP. CT. RULE 19(1)(a).

## CONCLUSION

For the reasons stated above the Court should deny a writ of certiorari.

Respectfully submitted,

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# In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 621

FREDERICK WISEMAN, et al.,
PETITIONERS

*v.*

COMMONWEALTH OF MASSACHUSETTS, et al.,
RESPONDENTS

## REPLY BRIEF FOR THE PETITIONERS

Several arguments made in the brief filed by the respondents in opposition to granting of the writ require comment and clarification.

A. THE FIRST QUESTION STATED IN THE PETITION PROPERLY STATES A BASIC CONSTITUTIONAL ISSUE IN THE TERMS AND CIRCUMSTANCES OF THE CASE.

Section I of the brief for the respondents alleges that the petitioners have failed to comply with Rule 23(c) of this Court in stating "the first issue" presented for review. Presumably the respondents refer to this question, set forth at page 3 of the petition:

> "Does the First Amendment permit a state to prohibit the showing to the general public of a documentary motion picture film which relates to a subject matter of acknowledged public interest and importance, and which is neither false nor obscene?"

Rule 23(c) requires that the petition for writ of certiorari contain "the questions presented for review, expressed in the terms and circumstances of the case, but without unnecessary detail", and further provides that "The statement of a question presented will be deemed to include every subsidiary question fairly comprised therein."

The question set forth above complies with the rule in every respect. The issue presented is whether or not a state (the Commonwealth of Massachusetts) can prohibit the showing to the general public (as the state has done in this case) of a documentary motion picture film (*Titicut Follies*) which relates to a subject matter of acknowledged public interest and importance (see Opinion of Supreme Judicial Court of Massachusetts, A-39) and which is neither false nor obscene.

The respondents apparently complain that the *reasons* given by the Massachusetts court for prohibiting exhibition of the film to the public are not stated in the first question. But it is the position of the petitioners, and they will so argue if the writ is granted, that the First Amendment does not allow a state to ban the exhibition of a documentary motion picture film which relates to a matter of public interest and importance, and which is not false or obscene, *for any reason*. See discussion of *Julian Messner, Inc.* v. *Spahn*, 393 U.S. 818 (1968) in Section C of this reply brief.[1]

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[1] It is arguable that no documentary film relating to a matter of public interest should be enjoined, even if false or inaccurate, but that

The first question thus states one basic issue in the case, in the terms and circumstances of the case. (Subsidiary issues relating to the grounds stated by the Massachusetts courts as the basis of the injunction against public exhibition of the film are set forth in the second and third questions at page 3 of the petition, and the Commonwealth makes no objection to the form of those questions.)

The argument of the respondents that only an abstract question of constitutional law is presented by the first question ignores the fundamental issue of whether or not an injunction against showing such a documentary film to the public can be sustained on *any* ground; and the contention of the respondents that no actual case or controversy is presented by the first question appears to be frivolous.[2]

B. A Novel Issue Involving The Use Of Unconstitutional Conditions As A Means Of Censorship Is Presented By This Case.

Section II of the brief filed by the respondents properly recognizes that "There is nothing novel about the principle of 'unconstitutional conditions.'" (This is agreed. See pages 21-22 of the petition.)

But this case does present a novel issue with respect to application of the recognized principle that a state may not grant a license or permission conditioned upon waiving of constitutional rights.

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issue is not presented here; the film in issue consists only of actual scenes and events recorded at the Bridgewater prison (Tr. 3-66, 6-4). There is no contention that the film is "obscene" in any sense.

[2] The respondents also accuse the petitioners of "omitting reference to the facts of the case" — but do not invite attention to any significant fact which has been omitted. Obviously the rules of this Court, which require that questions be stated "without unnecessary detail", Rule 23(c), do not contemplate that every finding of fact made by a trial court shall be incorporated into the questions presented.

The question of whether or not a state may enjoin a publication on a matter of public interest on the theory that the publisher has violated conditions imposed by the state in granting him access to observe and record the subject matter never has been decided by this Court.

The petitioners cite several cases in support of the proposition that a state may impose rules and regulations reasonably designed to protect its interests in maintaining "an orderly atmosphere" in its schools or other institutions. This argument is irrelevant. The film *Titicut Follies* was made without interfering in any way with normal operations of the Bridgewater institution, and exhibition of the film to the public could in no way impair the Commonwealth's task of maintaining "an orderly atmosphere" there. The question is whether or not the Commonwealth can impose some form of censorship, direct or indirect, upon the film maker as a condition of permitting him to film events and conditions in the prison, and then enforce that retained right of censorship by enjoining distribution of the film.

### C. The Respondents Have Misconstrued The *Hill* And *Spahn* Cases.

The discussion in Section III of the respondents' brief of *Time, Inc.* v. *Hill*, 385 U.S. 374 (1967) and *Julian Messner, Inc.* v. *Spahn*, 387 U.S. 239 (1967) is inaccurate and misleading. The respondents contend that "those decisions involved the type of invasion of privacy known as publicity placing a person in a false light," whereas the present case "involves the type of invasion of privacy known as publicity given to private life." This purported distinction is derived from the Restatement of Torts (2d), Tentative Draft No. 13 (1967), sections 652D and 652E.

The plaintiffs in both *Hill* and *Spahn* complained that details relating to their private lives or experiences had been published without their permission *and* inaccurately stated. Each case thus involved both "types" of invasion of privacy.

The members of the Hill family, who had been held captive by escaped convicts, were, like the inmates of Bridgewater who are shown in *Titicut Follies,* individuals whose experiences became a matter of public interest through no choice of their own. Spahn was a well-known baseball player, and thus a public figure by his own choice, but he complained that "areas of his personal and private life" had been publicized. See discussion of *Spahn* in *Time, Inc.* v. *Hill,* 385 U.S. 374, 386 (1967).

The *Hill* and *Spahn* decisions indicate that the First Amendment protects a false or erroneous publication on a matter involving a private individual whose experiences have become a subject of public interest, in the absence of calculated or deliberate falsification. It necessarily would seem to follow that a true publication on such a matter should be protected by the First Amendment.

Moreover, although the respondents rely upon the provisions of the Tentative Draft of the Restatement to draw an erroneous distinction between the present case and the *Hill* and *Spahn* cases, the respondents fail to mention section 652F, which immediately follows the sections upon which they rely and which provides that:

> "One is privileged to give publicity to facts concerning another which would otherwise constitute an invasion of his privacy, to the extent that such publicity is given to news or other matters in which the public has a legitimate interest." (Citing the *Hill* case in the comments which follow.)

While it may be ironical to speak of the "private life" of an inmate of an institution such as Bridgewater, it nevertheless is clear that the doctrine of *Hill* protects any publication such as the film here in issue.

*Hill* involved only an award of damages to the plaintiffs, whereas in *Spahn* the New York courts had awarded both damages and injunctive relief against publication of a book which was a fictionalized biography of the plaintiff. Examination of the subsequent history of the *Spahn* case indicates that this Court was concerned with the question of whether or not any injunction against distribution of the book could be permitted to stand. After the first decision of the New York Court of Appeals was vacated and remanded in *Julian Messner, Inc.* v. *Spahn*, 387 U.S. 239 (1967), the New York court reaffirmed its prior decision. *Spahn* v. *Julian Messner, Inc.*, 21 N.Y.2d 124, 286 N.Y.S. 2d 832, 233 N.E.2d 840 (1967). A second appeal was taken to this Court, which on October 14, 1968, noted probable jurisdiction, *Julian Messner, Inc.* v. *Spahn*, 393 U.S. 818 (1968), and said:

> "Counsel are requested to discuss in their briefs and oral arguments whether the injunctive relief entered September 3, 1964, in the Supreme Court of the County of New York constitutes an unconstitutional restraint upon publication."

However, the second appeal in *Spahn* was dismissed by stipulation of the parties under Rule 60, on January 17, 1969, and the issue of whether or not an injunction against publication could be permitted never was decided by this Court. A substantially similar issue is presented by the present case, and the time is ripe for this Court to rule upon it.

D. THE FILM *Titicut Follies* IS A DOCUMENTARY FILM ABOUT PEOPLE.

The stand consistently taken by the Commonwealth of Massachusetts and its officials with respect to the issues in this case is aptly summarized in this statement at page 10 of the brief filed by respondents:

> "In this case the interest is in Bridgewater as an institution and not in any of the individual inmates confined there."[3]

Even at this time, after more than two years of litigation, the Commonwealth does not comprehend the purpose and significance of the film *Titicut Follies*. It is *not* a film about prison architecture. It is a film about *people* — a film about the inmates of Bridgewater and the effects which conditions at the institution have upon them as people.

The film *Titicut Follies* does demonstrate to the viewer, in a dramatic and effective manner, that in fact the interest of the Commonwealth of Massachusetts "is in Bridgewater as an institution and not in any of the individual inmates confined there." This message of the film would be obliterated if no identifiable pictures of individual inmates were included in the film.

The respondents, at page 10 of their brief, appear to sanction "free debate about conditions at the institution", but no amount of "free debate", written or oral, can be an effective substitute for a documentary film which shows to members of the general public the very conditions about

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[3] Before the film was made, the respondent Gavin had expressed his concern in writing about "the effect the picturing of such old and antiquated facilities would have on the nationwide audience this would be shown to." (Exhibit 2)

which they should be concerned. The petitioners again urge that this Court view the film before ruling upon the petition.

Respectfully submitted,

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In the
# Supreme Court of the United States

OCTOBER TERM, 1969

No. 621

FREDERICK WISEMAN, *et al.*,
PETITIONERS,
*v.*
COMMONWEALTH OF MASSACHUSETTS, *et al.*,
RESPONDENTS.

**ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS**

## PETITION FOR REHEARING

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# In the Supreme Court of the United States

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RESPONDENTS.

**ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS**

## PETITION FOR REHEARING

The petitioners herein respectfully move this Court for an order vacating its denial of their petition for writ of certiorari, entered on June 15, 1970, and granting the petition. As grounds for this motion, the petitioners say as follows.

1. ALL JUSTICES OF THE COURT SHOULD BE AFFORDED AN OPPORTUNITY TO PARTICIPATE IN THE DECISION.

This case involves state censorship and suppression of a documentary motion picture film entitled *Titicut Follies*,

which shows the abysmal conditions existing at a state prison in Massachusetts.

A petition for writ of certiorari to the Supreme Judicial Court of Massachusetts was filed on September 19, 1969. The petition was denied on June 15, 1970.

Three Justices of this Court were of the opinion that the writ should have been granted. Presumably the writ would have been granted if one additional Justice had so voted. Mr. Justice Marshall did not participate in the consideration or decision of the petition. So far as the petitioners are aware, he is not disqualified for any reason from participation in the matter.

In light of the importance of the issues presented by the petition, petitioners submit that all nine justices of this Court should be afforded the opportunity to participate in the decision whether or not to grant the writ.

As noted in the original petition, this case presents novel and important First Amendment issues; and if this Court does not grant the writ, it will mark the first instance in which state censorship and suppression of a motion picture film of conceded social interest and importance has been permitted to stand.

Mr. Justice Harlan filed a dissenting opinion to the denial of the writ, observing that "I fail to see how, on a complex and important issue like this, it can be concluded that this Court should withhold plenary review." (Mr. Justice Brennan joined in that dissenting opinion; Mr. Justice Douglas also was of the opinion that certiorari should be granted.)

The importance of review by this Court also is demonstrated by comments in eminent law reviews published after filing of the petition: Comment, The "Titicut Follies" Case: Limiting the Public Interest Privilege, 70 Colum. L. Rev. 359 (1970); Note, 83 Harv. L. Rev. 1722 (May, 1970),

2. THE PETITIONERS HAVE BEEN SUED FOR $5,750,000 IN DAMAGES IN TWO RELATED CASES INVOLVING THE SAME ISSUES.

On September 23, 1969, four days after the petition for writ of certiorari was filed in this Court, two civil actions were commenced against the petitioners in the Superior Court of the Commonwealth of Massachusetts for Suffolk County. The actions purport to have been brought on behalf of James C. Bulcock, a respondent in this case, and thirty-four other inmates of the Bridgewater institution depicted in the film *Titicut Follies*. In one action (docket number 648364) the plaintiffs seek damages of $5,000,000.00. In the other action (docket number 648366) the same plaintiffs seek damages of $750,000.00 The actions have not been tried on the merits. Presumably an application for a stay of further proceedings would be granted if the Court granted certiorari in this case.

These actions for damages obviously have a chilling effect upon any publication of the film, even to the limited extent authorized by the decisions of the Massachusetts courts.

The same important constitutional issues of freedom of speech and press presented by this case are involved in the damage actions. More particularly, the scope and effect of the decision of this Court in *Time, Inc.* v. *Hill*, 385 U.S. 374 (1967) is directly in issue.

The petitioners submit that review of this case by the Court would result in a decision on the merits which would be dispositive of the damage actions for all practical purposes, and which would protect the petitioners from further exposure to financial liability and harrassment in connection with the exercise of their rights to publish information on matters of public concern.

### 3. The Decision of the Court in the Atlantic Coast Line Case Has Given Added Importance to Review by Certiorari in This Case.

The petitioners have had no decision by any federal Court as to their constitutional rights to publish the film here in issue, although a party generally is entitled to "choice of a federal forum for the hearing and decision of his constitutional rights." *Zwickler* v. *Koota,* 389 U.S. 241, 248 (1967). Accordingly, the petitioners have contemplated that, in the event that this Court denied certiorari, they would commence an action in a United States District Court to seek declaratory relief as to their constitutional rights, in accordance with the provisions of 42 U.S.C. 1983, and then, if necessary, injunctive relief against enforcement of the present state court injunction. *Zwickler* v. *Koota* 389 U.S. 241, 255 (1967).

This Court had not decided whether 42 U.S.C. 1983 creates an exception to the anti-injunction statute 28 U.S.C. 2283. See *Cameron* v. *Johnson,* 390 U.S. 611, 613, footnote 3 (1968). There is respectable authority for the proposition that such an exception exists, at least in First Amendment cases. *Machesky* v. *Bizzell,* 414 F.2d 283, 287, 291 (5th Cir. 1969). This Court also has implied that injunctive relief against enforcement of a state court decision may be granted as supplementary to federal declaratory judgment relief. *Zwickler* v. *Koota,* 389 U.S. 241, 255 (1967).

However, the decision of this Court on June 8, 1970, in the case of *Atlantic Coast Line Railroad Co.* v. *Brotherhood of Locomotive Engineers,* —— U.S. ——, 38 Law Week 4471, in which it was held that 28 U.S.C. 2283 precluded a federal court injunction to prevent the enforcement of a state court injunction against picketing, creates doubts that the petitioners now may obtain effective protec-

tion of their constitutional rights in any federal forum other than this Court.

If that is the meaning and effect of the *Atlantic Coast Line* decision (which did not discuss or distinguish the *Dombrowski- Zwickler-Cameron* line of cases), then it has become more important than ever before that the Court grant the writ and review the judgment of the state court in the present case.

## Conclusion

For the reasons set forth above, and those contained in the petition for writ of certiorari, petitioners pray that this Court grant rehearing of the order of denial, vacate that order, grant the petition and review the judgment below.

Respectfully submitted,

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## Certificate of Counsel

As counsel for the petitioner, I hereby certify that this petition for rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 58(2).

No. 627

Motion of Nat. Educ. Television for leave to file brief, as amicus curiae, in support of rehearing filed on July 10, 1962

(Not printed)